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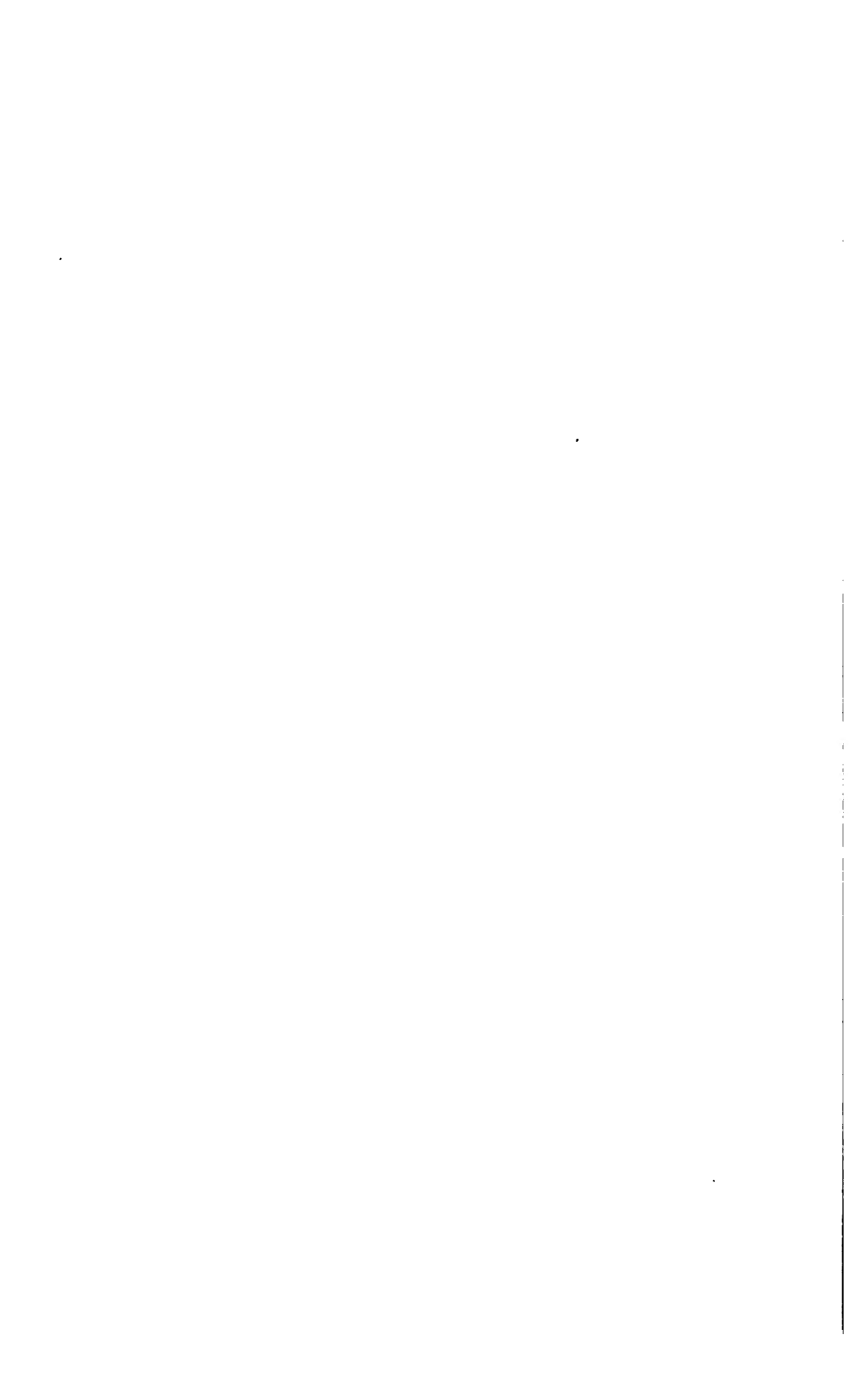
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697

**THE**  
**REVISED REPORTS.**

# TABLE OF COMPARATIVE REFERENCE.

<b>OLD REPORTS.</b>	<b>REVISED REPORTS.</b>	<b>OLD REPORTS.</b>	<b>REVISED REPORTS.</b>
<b>CASES FROM</b>		<b>CASES FROM</b>	
Adolphus & Ellis 12 vols. 40, 42 to 48, 50, 52 & 54		Keen—2 vols. . . . . 44	
Anstruther—3 vols. . . . . 3 & 4		Knapp—3 vols. . . . . 38, 40	
Arnold—2 vols. . . . . 50		Law Journal, O. S.—9 vols. 25 to 31, 34	
Ball & Beatty—2 vols. . . . . 12		Law Journal, N. S.—Vols. 1 to 11, 36, 37, 39, 41, 42, 46, 49, 52, 56, 59	
Barnewall & Adolphus—5 vols. 35 to 39		Lloyd & Goold, temp. Sugden . 46	
Barnewall & Alderson—5 vols. 18 to 24		Lloyd & Welsby . . . . . 35	
Barnewall & Cresswell 10 vols. . . . . 25 to 34		Maddock—6 vols. . 15 to 18 & 20 to 23	
Beavan—Vols. 1 to 5 49, 50, 52, 55, 59		Manning & Granger—Vols. 1 & 2 56, 58	
Bingham 10 vols. . 25, 27 to 31, 33 to 35, 38		Manning & Ryland—5 vols. 31 to 34	
Bingham, N. C. 6 vols. . . . . 41 to 44, 50 & 54		Marshall—2 vols. . . . . 15 & 17	
Blackstone, H.—2 vols. . . . . 2 & 3		Maule & Selwyn—6 vols. . 14 to 16	
Bligh—4 vols. . . . . 20 to 22		Meeson & Welsby Vols. 1 to 8 46, 49, 51, 52, 55, 56, 58	
Bligh, N. S.—Vols. 1 to 11 30 to 33, 35, 36, 38, 39, 42 & 51		McClelland . . . . . 26	
Bosanquet & Fuller—5 vols. 4 to 9		McClelland & Younge . . . . . 26	
Broderip & Bingham—3 vols. 21 to 24		Merivale—3 vols. . . . . 15 to 17	
Campbell—4 vols. . . . . 10 to 16		Moody & Malkin . . . . . 31	
Carrington & Payne—Vols. 1 to 8 28, 31, 33, 34, 38, 40, 48, 56		Moody & Robinson—Vol. 1 . . . 41	
Chitty—2 vols. . . . . 22 & 23		Moore, C. P.—12 vols. . . . . 19 to 26	
Clark & Fennelly—Vols. 1 to 10 . 36, 37, 39, 42, 47, 49, 51, 54, 57, 59		Moore, P. C.—Vols. 1 to 4 43, 46, 50, 51	
Cooper temp. Brougham . . . . . 38		Moore & Payne—5 vols. 29 to 31, 34	
Cooper, C. P. . . . . 46		Moore & Scott—4 vols. . . . . 34, 35, 36	
Cooper, G. . . . . 14		Murphy & Hurlstone . . . . . 5	
Cox—2 vols. . . . . 1 & 2		Mylne & Craig—5 vols. 43, 45, 46	
Craig & Phillips . . . . . 54		Mylne & Keen—3 vols. . . . . 36, 39, 4	
Crompton & Jervis—2 vols. . 35 & 37		Neville & Manning—6 vols. 38 to 4	
Crompton & Meeson—2 vols. 38, 39		Neville & Perry—3 vols. . . . . 44 & 4	
Crompton, Meeson & Roscoe 2 vols. . . . . 40, 41		Peake—2 vols. . . . . 3 & 4	
Daniell . . . . . 18		Perry & Davison—4 vols. 48, 50, 52, 5	
Danson & Lloyd . . . . . 34		Price—13 vols. . . . . 15 to 2	
Dow—6 vols. . . . . 14 to 16 & 19		Queen's Bench—Vols. 1 & 2. 55, 5	
Dow & Clark—Vols. 1 & 2 . . . . . 35		Russell—5 vols. . . . . 25 to 2	
Dowling—Vols. 1 to 8 36, 39, 41, 46, 49, 54 & 59		Russell & Mylne—2 vols. . . . . 32, 3	
Dowling & Ryland's K. B. 9 vols. . . . . 24 to 30		Russell & Ryan . . . . . 1	
Dowling & Ryland's N. P. . . . . 25		Ryan & Moody . . . . . 2	
Drury & Walsh—2 vols. . . . . 56		Schoales & Lefroy—2 vols. . . . .	
Drury & Warren—Vols. 1 & 2 58, 59		Scott—8 vols. 41 to 44, 50 & 5	
Durnford & East—8 vols. . . . . 1 to 5		Scott, N. B.—Vols. 1 & 2 . . . . . 56, 5	
East—16 vols. . . . . 5 to 14		Simons—Vols. 1 to 12 27, 29, 30, 34, 35, 38, 40, 42, 47, 51, 54 & 5	
Espinasse—6 vols. . . . . 5, 6, 8, 9		Simons & Stuart—2 vols. . . . . 24 & 2	
Forrest . . . . . 5		Smith—3 vols. . . . . 7 & 8	
Gale & Davison—Vols. 1 & 2 55, 57		Starkie—3 vols. . . . . 18 to 20 & 2	
Gow . . . . . 21		Swanston—3 vols. . . . . 18 & 1	
Haggard's Adm.—3 vols. . . . . 33, 35		Tamlyn . . . . . 1	
Hare—Vol. 1 . . . . . 58		Taunton—8 vols. . . . . 9 to 1	
Harrison & Wollaston—2 vols. . 47		Turner & Russell . . . . . 23 & 2	
Hodges—3 vols. . . . . 42 & 43		Tyrwhitt—5 vols. . . . . 35, 37 to 4	
Hogan . . . . . 34		Tyrwhitt & Granger . . . . . 4	
Holt . . . . . 17		Vesey, Jr.—19 vols. . . . . 1 to 1	
Horn & Hurlstone—Vol. 1 . . . . . 51		Vesey & Beames—3 vols. . . . . 12 & 1	
Hurlstone & Walmsley . . . . . 58		West, H. L. . . . . 1	
Jacob . . . . . 23		Wightwick . . . . . 1	
Jacob & Walker—2 vols. . . . . 20 to 22		Willmore, Wollaston & Davison	
Jurist—Vols. 1 to 4 . . . . . 49, 55, 58		Willmore, Wollaston & Hodges .	
		Wilson, Chy. . . . . 1	
		Wilson, Ex. Eq. . . . . 1	
		Younge, Ex. Eq. . . . . 1	
		Younge & Collyer, C. C.—Vol. 1 .	
		Younge & Collyer, Ex. Eq. 4 vols. . . . . 41, 47, 51 &	
		Younge & Jervis—3 vols. . 30 to	

THE  
**REVISED REPORTS**

BEING

A REPUBLICATION OF SUCH CASES

IN THE

ENGLISH COURTS OF COMMON LAW AND EQUITY,

FROM THE YEAR 1785,

*AS ARE STILL OF PRACTICAL UTILITY.*

EDITED BY

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1841—1844.

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## PREFACE TO VOLUME LIX.

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AMONG the House of Lords cases in this volume will be found the celebrated answer of the Judges to questions arising out of *M'Naghten's* case (p. 85), with the separate opinion of Maule, J. The authority and value of the rules laid down by the majority have been repeatedly discussed from every point of view, and we have no desire to add to the literature of the subject. Perhaps some of the discussion might have been more profitable if lawyers had always borne in mind that there is no such thing as absolute sanity or insanity, and the relation of a given person's faculties to the normal standard of intelligence is and must be a question of fact; and if some medical men, on the other hand, had been less hasty to assume, as if it were a necessary general proposition of morals and law, that no person of unsound mind can ever be responsible for his acts, and had been more willing to understand that whether, on the facts proved (including any proper scientific inferences of fact), a man is or is not responsible is and must be a question of law. Much harm has been done here, as elsewhere, by premature zeal for definition.

*R. v. Millis*, p. 134, and in a less degree the less famous Privy Council case of *Escott v. Mastin*, p. 351, show the astonishing ignorance of the Canon Law which prevailed even among very learned persons in this country sixty years ago. The certainly wrong result of *R. v. Millis* (for one can hardly call it a decision) gave occasion to Lord Campbell, some years later, to lay down a dogma which had even less historical foundation, that of the judicial infallibility of the House of Lords. His doctrine, though contrary, so far as we know, to the practice of every other court of last resort in the world, has been confirmed in our own time without any pretence of serious consideration. In this very volume

we may see the Judicial Committee overruling a former decision of its own: *Kielley v. Carson*, p. 336, an interesting and important case on the powers of colonial Legislatures.

*Railton v. Mathews*, p. 308—decided by the House of Lords on an appeal from Scotland, but proceeding on general principles and fully admitted as authority in England—is a leading case on the duty of disclosure between creditor and surety.

The learned reader will perceive by reading the late Mr. Beavan's note at p. 533, and observing the dates of the cases in the text, that in his time the decisions of the Master of the Rolls had to wait a year or more to be reported in "their regular order." The profession endured this state of things, and paid for it in heavy subscriptions to several independent sets of reports, for more than twenty years longer. From two to three months is now the time usually required for reporting a case in full, and less in favourable circumstances. Nor did the delays of the old system secure accuracy. We have called attention by foot-notes to some particularly bad specimens of clerical or typographical blunders in the original reports.

"You can find authority for anything in Beavan" was a current saying among equity lawyers in our younger days. The reporters of Sir Edward Sugden's Irish decisions were more discriminating, or their Judge more cautious. But one cannot help thinking they reported something too copiously. We hope nobody will ever want to discuss a *quasi* entail of an estate *pur auter vie* again: but *Allen v. Allen*, p. 696, is authority, and must stand on the chance of it. *Mortimer v. Shortall*, p. 730, is really important as laying down sound doctrine as to the evidence on which the Court acts in rectifying instruments: a doctrine, it may still be not superfluous to observe, which has nothing to do with the Statute of Frauds.

*Gordon v. Cheltenham Ry. Co.*, p. 486, gives us incidentally a quaint picture of our railway system in its infancy, when trains had to stop at places where there was no station "for the purpose of changing the engines."



# JUDGES

## OF THE

### HIGH COURT OF CHANCERY.

1841—1844.

(4 & 5 VICT.—7 & 8 VICT.)

---

LORD COTTENHAM, 1836—1841 . . .	}	<i>Lord Chancellors.</i>
LORD LYNDHURST, 1841—1846 . . .	}	
LORD LANGDALE, 1836—1851 . . .		<i>Master of the Rolls.</i>
SIR LANCELOT SHADWELL, 1827—1850 .	}	
SIR J. L. KNIGHT BRUCE, 1841—1851 . .	}	<i>Vice-Chancellors.</i>
SIR JAMES WIGRAM, 1841—1850 . . .	}	

---

### COURT OF QUEEN'S BENCH.

LORD DENMAN, 1832—1850 . . .	.	<i>Chief Justice.</i>
SIR JOSEPH LITTLEDALE, 1824—1841 . . .	}	
SIR JOHN PATTESON, 1830—1852 . . .	}	
SIR JOHN WILLIAMS, 1834—1846 . . .	}	<i>Judges.</i>
SIR JOHN T. COLEBRIDGE, 1835—1858 . .	}	
SIR WILLIAM WIGHTMAN, 1841—1863 . . .	}	

## COURT OF COMMON PLEAS.

---

SIR N. C. TINDAL, 1829—1846 . . .	<i>Chief Justice.</i>
SIR JOHN B. BOSANQUET, 1830—1842 . .	} <i>Judges.</i>
SIR THOMAS COLTMAN, 1837—1849 . .	
(1) THOMAS ERSKINE, 1839—1844 . .	
SIR WILLIAM H. MAULE, 1839—1855 . .	
SIR C. CRESSWELL, 1842—1858 . .	
SIR WILLIAM ERLE, 1844—1846 . .	

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## COURT OF EXCHEQUER.

---

LORD ABINGER, 1834—1844 . . .	} <i>Chief Barons.</i>
SIR FREDERICK POLLOCK, 1844—1866 . .	
SIR JOHN GURNEY, 1832—1845 . . .	} <i>Barons.</i>
SIR E. H. ALDERSON, 1834—1857 . .	
SIR JAMES PARKE, 1834—1856 . . .	
SIR ROBERT M. ROLFE, 1839—1850 . .	

---

SIR JOHN CAMPBELL, 1835—1841 . . .	} <i>Attorneys-General.</i>
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SIR W. W. FOLLETT, 1844—1845 . .	
SIR THOMAS WILDE, 1839—1841 . . .	} <i>Solicitors-General.</i>
SIR W. W. FOLLETT, 1841—1844 . .	
SIR FREDERICK THESIGER, 1844—1845 . .	

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SIR EDWARD BURTENSHAW SUGDEN . . .	} <i>Lord Chancellor of Ireland.</i>
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(1) The description of Mr. Justice Erskine as a knight in the earlier volumes of Manning and Granger's Reports was erroneous. As a peer's son he would not have been knighted in the ordinary course; and the lists of the Judicial Committee in Moore's Privy Council Reports, and of the Benchers of Lincoln's Inn in the Law List down to 1863 (confirmed by the description of the Right Hon. Thomas Erskine in a deed of which a copy is before me), show that in fact he was not.—F. P.

# TABLE OF CASES

REPRINTED FROM

10 CLARK & FINNELLY; 4 MOORE, P. C.; 5 BEAVAN; 2  
DRURY & WARREN (IR.); 8 DOWLING, P. C.; 11 LAW  
JOURNAL.

	PAGE
ACEY v. Simpson, 5 Beav. 35 . . . . .	404
Agabeg v. Hartwell, 5 Beav. 271 . . . . .	495
Alden v. Foster, 5 Beav. 592 . . . . .	572
Aldridge v. Westbrook, 5 Beav. 188 . . . . .	462
Alexander v. Alexander, 5 Beav. 518 . . . . .	566
Allen v. Aldridge, 5 Beav. 401; 13 L. J. Ch. 155; 8 Jur. 435 . . . . .	533
— v. Allen, 2 Dr. & War. 307; 1 Con. & L. 427 . . . . .	696
Allen v. M'Pherson, 5 Beav. 469; 11 L. J. Ch. 59 . . . . .	563
Altree v. Hordern, 5 Beav. 623; 12 L. J. Ch. 78 . . . . .	581
Ashton v. M'Dougall, 5 Beav. 56; 11 L. J. Ch. 344; 6 Jur. 447 . . . . .	414
Att.-Gen. v. Bosanquet, 11 L. J. Ch. 43 . . . . .	591
Att.-Gen. v. Newcastle (Corporation of), 5 Beav. 397; 6 Jur. 789 . . . . .	510
Att.-Gen. v. Persse, 2 Dr. & War. 67 . . . . .	645
— v. Potter, 5 Beav. 164; 14 L. J. Ch. 16 . . . . .	448
Avelett v. Goddard, 11 L. J. C. P. 123 . . . . .	820
BALFE v. Lord, 2 Dr. & War. 480; 1 Con. & L. 519 . . . . .	786
Barker v. Railton, 11 L. J. Ch. 372; 6 Jur. 549 . . . . .	616
Batt v. Anns, 11 L. J. Ch. 52 . . . . .	600
Baylee v. Quin, 2 Dr. & War. 116 . . . . .	671
Becke, <i>Re</i> , 5 Beav. 406; 13 L. J. Ch. 157; 8 Jur. 505 . . . . .	537
Beere v. Ward, 10 Cl. & Fin. 611, <i>n.</i> . . . .	279, <i>n.</i>
Blunden v. Desart, 2 Dr. & War. 405; 2 Con. & L. 111 . . . . .	753
Brennan v. Bolton, 2 Dr. & War. 349 . . . . .	721
Bristow v. Bristow, 5 Beav. 289 . . . . .	501
Browne v. Browne, 11 L. J. Ch. 57; 5 Jur. 1053 . . . . .	601
Burdett v. Spilsbury, 10 Cl. & F. 340 . . . . .	105
Butcher v. Leach, 5 Beav. 392; 7 Jur. 74 . . . . .	532
Byng v. Stratford (Lord), 5 Beav. 558; 12 L. J. Ch. 169 . . . . .	568
CAREW v. White, 5 Beav. 172 . . . . .	454
Chick v. Smith, 8 Dowl. Pr. Cas. 337; 4 Jur. 86 . . . . .	829
Cookson v. Reay, 5 Beav. 22 . . . . .	404
Cooper v. Bockett, 4 Moore, P. C. 419 . . . . .	371
Curre v. Bowyer, 5 Beav. 6, <i>n.</i> . . . .	395, <i>n.</i>
Curtis v. Lukin, 5 Beav. 147; 11 L. J. Ch. 380; 6 Jur. 721. . . . .	442

*Note.*—Where the reference is to a mere note of a case reproduced elsewhere in the Revised Reports, or omitted for special reasons, the names of the parties are printed in italics.



	PAGE
DAVIES v. Fisher, 5 Beav. 201; 11 L. J. Ch. 338; 6 Jur. 248 . . . . .	468
Downes, <i>Re</i> , 5 Beav. 425; 13 L. J. Ch. 159 . . . . .	545
Drake v. <i>Att.-Gen.</i> , 10 Cl. & F. 257 . . . . .	104
<i>Ely (Dean of) v. Bliss</i> , 5 Beav. 574 . . . . .	570
Enraght v. Fitzgerald, 2 Dr. & War. 43; 1 Con. & L. 181 . . . . .	637
Escott v. Mastin, 4 Moore, P. C. 104 . . . . .	351
Evans v. Brown, 4 Beav. 114; 11 L. J. Ch. 349; 6 Jur. 380 . . . . .	425
— v. Harris, 5 Beav. 45 . . . . .	409
Ezart v. Lister, 5 Beav. 585; 12 L. J. Ch. 10 . . . . .	570
FARRAR v. Winterton (Earl of), 5 Beav. 1; 6 Jur. 204 . . . . .	392
Fewster v. Turner, 11 L. J. Ch. 161; 6 Jur. 144 . . . . .	607
Figg v. Wedderburne, 11 L. J. Q. B. 45; 6 Jur. 218 . . . . .	816
Finlay v. Howard, 2 Dr. & War. 490 . . . . .	793
Fitzwalter Peerage, 10 Cl. & F. 193 . . . . .	80
— 10 Cl. & F. 946 . . . . .	316
French v. Macale, 2 Dr. & War. 269; 1 Con. & L. 459 . . . . .	675
GARDNER v. Dangerfield, 5 Beav. 389 . . . . .	531
Gervais v. Edwards, 2 Dr. & War. 80; 1 Con. & L. 242 . . . . .	647
Glengall v. Barnard, 5 Beav. 245 . . . . .	493
Gordon v. Cheltenham Railway Co., 5 Beav. 229; 2 Rail. Cas. 800 . . . . .	486
Grace v. Mountmorris (Lord), 2 Dr. & War. 432 . . . . .	765
Greet v. Greet, 5 Beav. 123 . . . . .	431
Grieveson v. Kirsopp, 5 Beav. 283 . . . . .	497
Griffiths v. Evan, 5 Beav. 241; 11 L. J. Ch. 219 . . . . .	491
HANBURY v. Spooner, 5 Beav. 630; 12 L. J. Ch. 434 . . . . .	585
Hare v. Hare, 5 Beav. 629; 12 L. J. Ch. 344; 7 Jur. 387 . . . . .	584
Harrison v. Duignan, 2 Dr. & War. 295; 1 Con. & L. 377 . . . . .	689
Harvey v. Harvey, 5 Beav. 134 . . . . .	435
— v. Hewitt, 8 Dowl. Pr. Cas. 598; 4 Jur. 292 . . . . .	838
Hay v. Bowen, 5 Beav. 610; 12 L. J. Ch. 78; 6 Jur. 1119 . . . . .	577
Henderson v. Constable, 5 Beav. 297; 11 L. J. Ch. 332 . . . . .	505
Henfrey v. Henfrey, 4 Moore, P. C. 29 . . . . .	331
Hennessy, <i>Re</i> , 2 Dr. & War. 555; 1 Con. & L. 559 . . . . .	811
Henry v. Smith, 2 Dr. & War. 381; 1 Con. & L. 506 . . . . .	738
Hereford v. Ravenhill, 5 Beav. 51; 11 L. J. Ch. 173 . . . . .	411
Heron v. Stokes, 2 Dr. & War. 89; 1 Con. & L. 270; 12 Cl. & F. 161 . . . . .	652
Higgins v. Shaw, 2 Dr. & War. 356; 1 Con. & L. 400 . . . . .	726
Hinde v. Blake, 5 Beav. 431; 12 L. J. Ch. 56 . . . . .	549
Hoare v. Byng, 5 Beav. 564; 10 Cl. & F. 508 . . . . .	122
Horlock v. Smith, 11 L. J. Ch. 157; 6 Jur. 478 . . . . .	606
Hotham v. Somerville, 5 Beav. 360; 6 Jur. 861 . . . . .	517
Hughes v. Budd, 8 Dowl. Pr. Cas. 478; 4 Jur. 654 . . . . .	835
LOTT v. Genge, 4 Moore, P. C. 265 . . . . .	366
Ironmongers' Co. v. <i>Att.-Gen.</i> , 10 Cl. & F. 908 . . . . .	308
JOHNSTON v. Todd, 5 Beav. 597 . . . . .	573
Johnstone v. Beattie, 10 Cl. & F. 42 . . . . .	23
Jones v. Arthur, 8 Dowl. Pr. Cas. 442; 4 Jur. 859 . . . . .	833
Jordan v. Chowns, 8 Dowl. Pr. Cas. 709 . . . . .	852

John  
Finger  
Cass.

Boy  
Heron  
Bo  
Ca  
Bacham  
Lucena

Att.-Gr  
Wa  
Case  
Kernan  
Shor  
Moley  
Wharton

Wes  
Long  
Knot  
Pe  
Seely

W  
ML  
Bishop

4 Jur. 630  
— r. Ingleto  
— r. Mills  
— r. Wilt-

— r. Wilt-  
Richards v. Co  
Robinson v. V  
Robson v. At  
Roche, *Re*, 2  
Rochford v. F  
Rumsey v. W  
Rundell v. B  
Russell v. Di  
Rutland v. A

SAYRE v. V  
Jur. 10

Scott v. Mil  
Scott and  
Sidebottom  
Smith v. C  
— r. C

Sturch v.

Sutton v.

THOMAS  
Thorpe v.  
Tracy Pe

	PAGE
KELLAWAY v. Johnson, 5 Beav. 319; 6 Jur. 751 . . . . .	511
Kendall v. Granger, 5 Beav. 300; 11 L. J. Ch. 405; 6 Jur. 919 . . . . .	507
Kielley v. Carson, 4 Moore, P. C. 63 . . . . .	336
LAMPHIER v. Despard, 2 Dr. & War. 59; 1 Con. & L. 200 . . . . .	641
Langton v. Horton, 5 Beav. 9; 11 L. J. Ch. 233; 6 Jur. 357 . . . . .	397
Lee v. Read, 5 Beav. 381; 12 L. J. Ch. 26; 6 Jur. 1026 . . . . .	526
Le Normand v. Capua (Prince of), 11 L. J. C. P. 58; 6 Jur. 64 . . . . .	818
Lewis v. Leatham, 11 L. J. Ch. 176; 6 Jur. 501 . . . . .	613
Lucena v. Lucena, 5 Beav. 249 . . . . .	494
MARCH v. Att.-Gen., 5 Beav. 433; 12 L. J. Ch. 31; 6 Jur. 829 . . . . .	550
M'Dermott v. Wallace, 5 Beav. 142; 6 Jur. 547 . . . . .	441
M'Naghten's Case, 10 Cl. & F. 200 . . . . .	85
Molony v. Kernan, 2 Dr. & War. 31 . . . . .	635
Mortimer v. Shortall, 2 Dr. & War. 363; 1 Con. & L. 417 . . . . .	730
NASH v. Morley, 5 Beav. 177; 11 L. J. Ch. 336; 6 Jur. 520 . . . . .	456
Nokes v. Wharton, 5 Beav. 448 . . . . .	554
PARSONS v. Westbrook, 5 Beav. 188 . . . . .	462
Paterson v. Long, 5 Beav. 186 . . . . .	461
Perry v. Knott, 5 Beav. 293 . . . . .	502
Pettingall v. Pettingall, 11 L. J. Ch. 176 . . . . .	613
Price v. Seeley, 10 Cl. & F. 28 . . . . .	13
QUARMAN v. Williams, 5 Beav. 133 . . . . .	435
RAILTON v. Mathews, 10 Cl. & F. 934 . . . . .	308
Reg. v. Bishop's Stoke (Lord of the Manor of), 8 Dowl. Pr. Cas. 608; 4 Jur. 630 . . . . .	839
— v. Ingleton (Lords of the Manor of), 8 Dowl. Pr. Cas. 693; 4 Jur. 700 . . . . .	845
— v. Millis, 10 Cl. & F. 534; 8 Jur. 717 . . . . .	134
— v. Wilts (Justices of), 8 Dowl. Pr. Cas. 717 . . . . .	858
— v. Wilts and Berks Canal Co., 8 Dowl. Pr. Cas. 623; 4 Jur. 848 . . . . .	842
Richards v. Cooper, 3 Beav. 304 . . . . .	510
Robinson v. Wood, 5 Beav. 388; 12 L. J. Ch. 93 . . . . .	530
Robson v. Att.-Gen., 10 Cl. & F. 471 . . . . .	122
Roche, Re, 2 Dr. & War. 287; 1 Con. & L. 306 . . . . .	686
Rochfort v. Fitzmaurice, 2 Dr. & War. 1; 1 Con. & L. 158 . . . . .	617
Rumsey v. Webb, 11 L. J. C. P. 129; Car. & M. 104 . . . . .	821
Rundell v. Rivers (Lord), 11 L. J. Ch. 27; 1 Ph. 88 . . . . .	586
Russell v. Dickson, 2 Dr. & War. 133 . . . . .	674
Rutland v. Wythe, 10 Cl. & F. 419 . . . . .	116
SAYER v. Wagstaff, 5 Beav. 415; 13 L. J. Ch. 161; 14 L. J. Ch. 116; 8 Jur. 1083 . . . . .	540
Scott v. Milne, 5 Beav. 215; 12 L. J. Ch. 233; 7 Jur. 709 . . . . .	478
Scott and Morgan, Ex parte, 8 Dowl. Pr. Cas. 328; 4 Jur. 579 . . . . .	828
Sidebotham v. Barrington, 5 Beav. 261 . . . . .	495
Smith v. Chichester, 2 Dr. & War. 393; 1 Con. & L. 486 . . . . .	746
— v. Gould, 4 Moore, P. C. 21 . . . . .	326
Sturch v. Young, 5 Beav. 557; 12 L. J. Ch. 56 . . . . .	567
Sutton v. Torre, 11 L. J. Ch. 255; 6 Jur. 234 . . . . .	614
THOMASON v. Moses, 5 Beav. 77; 6 Jur. 403 . . . . .	421
Thorpe v. Owen, 5 Beav. 224; 11 L. J. Ch. 129 . . . . .	484
Tracy Peerage, 10 Cl. & F. 154 . . . . .	59

	PAGE
Tucker v. Boswell, 5 Beav. 607 . . . . .	575
Turner v. Corney, 5 Beav. 515 . . . . .	564
UNDERWOOD v. Hatton, 5 Beav. 36 . . . . .	405
WALLACE v. Wallace, 2 Dr. & War. 452; 1 Con. & L. 491 . . . . .	766
Westby v. Westby, 2 Dr. & War. 502; 1 Con. & L. 537 . . . . .	795
White v. Supple, 2 Dr. & War. 471; 1 Con. & L. 525 . . . . .	780
Whitmarsh, <i>Ex parte</i> , 8 Dowl. Pr. Cas. 431; 4 Jur. 823 . . . . .	831
Willats v. Busby, 5 Beav. 193; 12 L. J. Ch. 105 . . . . .	466
Williams v. Wentworth, 5 Beav. 325 . . . . .	515
Williamson v. Advocate-General of Scotland, 10 Cl. & F. 1 . . . . .	1
Withy v. Mangles, 10 Cl. & F. 215 . . . . .	95
Worge v. Relf, 11 L. J. M. C. 125 . . . . .	824
Wrixon v. Vize, 2 Dr. & War. 192; 1 Con. & L. 298 . . . . .	674

## NOTE.

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*The first and last pages of the original report, according to the paging by which the original reports are usually cited, are noted at the head of each case, and references to the same paging are continued in the margin of the text.*



# The Revised Reports.

VOL. LIX.

IN THE HOUSE OF LORDS.

WILHELMINA BOYD ROBERTSON WILLIAMSON *v.*  
THE ADVOCATE-GENERAL OF SCOTLAND (1).  
(10 Clark & Fennelly, 1—21.)

Will—Direction to sell—Legacy duty.

A testator devised, by two testamentary papers, his real and personal estates to trustees. In the first paper he declared the trusts, and among others he created a power of sale in the following terms: "To sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments, and others hereby generally and particularly disposed to them, &c., on such conditions and at such prices as they shall think fit." To render these sales effectual, he granted full power to convey, &c. The paper then went on thus: "Declaring always, &c. that my said trustees shall by their acceptance hereof be bound and obliged, after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens upon them, to satisfy and pay all my lawful and just debts," &c. By a second testamentary paper reciting the first, he said that by the recited paper he had disposed of his heritable and moveable estates to trustees on the trusts therein mentioned, and "Amongst others, my trustees are required to turn my means and effects, thereby conveyed in trust, into money;" and he gave directions accordingly. He further directed, that in case he should die leaving an heir of his body, his trustees should employ the trust-funds for the use of such heir; and that as soon as such heir should attain majority or be married, the trustees should "denude themselves of the whole trust and funds" in favour of such heir, but to return to the trustees in case of failure of heirs of his body, without disposing of the same.

Held, that the testamentary papers must be construed as amounting

1843.  
*March 16, 17.*  
—  
Lord  
BROUGHAM.  
Lord  
COTTENHAM.  
Lord  
CAMPBELL.  
[ 1 ]

(1) *Attorney-General v. Lomas* (1873) L. R. 9 Ex. 29, 43 L. J. Ex. 32.

WILLIAMSON  
v.  
THE  
ADVOCATE-  
GENERAL.  
[ \*2 ]

\*not merely to a power of sale for the purposes of the trust, but to a direction to sell in case the testator should die without leaving any heir of his body living at the time of his death. Held, therefore, that though in fact the real estate was not sold, the positive direction to sell rendered it liable to the legacy duty.

THIS was a writ of error from the Court of Exchequer in Scotland, upon a judgment delivered there, by which the plaintiff in error was declared liable to the payment of the sum of 2,500*l.* for legacy duty, accruing due to the Crown under the following circumstances, as stated in the form of a special verdict: Archibald Robertson, of Lawers in the county of Perth, a Major-General in the army, was possessed of considerable real and personal property, and in the year 1799 duly executed a testamentary paper, disposing of his property, in which there were, among many others, the following clauses:

“I, Major-General Archibald Robertson, of Lawers, for certain weighty causes and considerations me moving, do hereby assign, dispo<sup>n</sup>e, convey, and make over, under the conditions, provisions, and reservations after specified, and in trust always for the uses, ends, and purposes after mentioned, to and in favour of” (certain persons in the deed named), “all and whole my heritable and moveable estate, chattels, and effects, goods and gear, debts and sums of money.” After farther description of the moveable estate, there follows,—“As also all lands, messuages, tenements, and hereditaments presently pertaining to me, or that may pertain or belong to me at the time of my decease, and particularly without prejudice to the foresaid generality, ‘all and whole the lands of Forden, now called Lawers, comprehending,’ &c.: “But always with and under the conditions, provisions, and reservations after

[ \*3 ]

specified, and in trust always for the \*uses, ends, and purposes, after mentioned; viz. declaring, as it is hereby expressly provided, that these presents are granted by me, the said Major-General Archibald Robertson, with full power to my said trustees, so soon after my decease as may be judged expedient, to call for, uplift, and discharge, or convey the principal sums contained in the several heritable bonds before assigned, or such parts thereof as shall then be remaining due, and interest that may be due thereon, and penalties if incurred; and also to call and sue for, receive, discharge, or convey, or in any other manner and way to dispose upon all and every sum or sums of money that may pertain and belong to me, whether vested in any of the public funds of Great Britain, or secured on mortgage in England, or in whatever other

way the said sum or sums of money may be vested or secured, and also all other debts and sums of money due and addebted to me by whatever person or persons; and also to sell and dispose of the lands, mills, teinds, woods, fishings, messuages, tenements, and hereditaments, and others hereby generally and particularly disposed to them in trust, and that either by private sale or public voluntary roup, and by wholesale or by parcels, on such conditions and at such prices as they shall think fit, and with power to receive the prices or to take bonds for the payment of the same from the purchasers, with one or more cautioners reputed responsible at the time. And for rendering effectual such sale or sales, I hereby grant full power to my said trustees to grant dispositions, assignments, discharges, and other writings necessary, with all clauses needful to the purchaser or purchasers of the said lands, teinds, mills, woods, fishings, and others before disposed, and that simply, so as the said purchasers shall be no ways concerned about the application of the prices thereof, nor be burdened or affected with any of the provisions herein contained." The deed then went on to give the trustees power to admit and eject tenants, to grant leases, appoint collectors of rents, &c. "Declaring always, as it is hereby expressly provided and declared, that my said trustees shall, by their acceptance hereof, be bound and obliged, after the sale of the said lands, teinds, and others before disposed, which I recommend to them to be done as soon as convenient after this trust opens to them, to satisfy and pay all my just and lawful debts, and to perform all the legal obligations I may then lie under for the payment of any sum or sums of money, more particularly those contained in the contract of marriage of date the 11th day of December, 1784, entered into betwixt me and Mrs. Catherine Austin, *alias* Robertson, my spouse, in case she shall happen to survive me; and on the sale of the lands, teinds, and others before disposed, to allow to remain in the purchaser's hands a sum of money, the annual rent of which shall be at least equal to her jointure or annuity, free of all deductions whatever, or to lend out such sum of money on heritable security at the sight and to the satisfaction of the persons at whose instance execution is to pass on the contract of marriage entered into betwixt her and me of the date before mentioned; the rights and securities for said sum of money to be taken to the said Catherine Austin, *alias* Robertson, in liferent, during all the days of her lifetime, in security to her of the jointure or annuity provided to her in the contract of marriage

WILLIAMSON  
 T.  
 THE  
 ADVOCATE-  
 GENERAL.

[ \*4 ]



WILLIAMSON  
 r.  
 THE  
 ADVOCATE-  
 GENERAL.  
 [ \*5 ]

before mentioned, and to my said trustees in fee, for the purposes of the trust as after mentioned, and to their assignees. And after payment of my just and lawful \*debts, as before mentioned, and securing a sum for payment of my said spouse's jointure or annuity in manner before mentioned, and also after payment of the expenses necessarily incurred in the execution of the trust, I hereby appoint my said trustees to content and pay, or assign and make over to such person or persons as I may already have named and appointed, or shall hereafter name and appoint, such sum or sums of money, or proportion or proportions of the monies arising from the subjects hereby generally and particularly conveyed and disposed in trust, including the fee of the sum to be liferented to my said spouse in case she survive me, as I shall judge proper, payable at such terms and under such conditions as I shall judge necessary. And after making payment of these sums, I hereby appoint my said trustees to make up a stated account of their intromissions and payments made in virtue of this trust, and to denude themselves of the trust hereby committed to them, by assigning, making over, or paying the residue of my means and effects hereby disposed to them in trust, including the right of fee of the same, to be liferented by my said spouse, in case she shall survive me, in so far as the same shall not have been disposed of by me, to and in favour of any person or persons I may think proper to appoint, by writing; whom failing, to Rachel and Ann Robertsons, my sisters-german, equally betwixt them, share and share alike, or to the survivor of them, and the heirs and assignees of the survivor. And on my said trustees obtaining discharges of the sums I shall think proper to dispose and bequeath as aforesaid, and on receiving a discharge or discharges from my said sisters or survivor of them, or the heirs or assignees of the survivor, for the residue of the monies arising from the funds \*hereby conveyed in trust, if any residue shall remain, or from the heirs or representatives of such of my said legatees and residuary legatees as may have survived me, but died either before the sale of my said lands and estate, or before the conveyance or payment is made to them by my said trustees; I hereby declare that such discharge to my said trustees shall be a full and complete exoneration to them of their whole intromissions had with the whole before-mentioned means and estate, heritable and personal, in virtue of this trust-right. And farther, as it will require time after this trust opens to my said trustees before they can turn my heritable subjects into cash, and uplift and receive payment of the

[ \*6 ]

heritable and moveable debts due to me: therefore, and in case the free annual income of my means and effects shall not be equal to, or sufficient for, the payment annually of the interest of the sums I may think proper to appoint my trustees to pay to the persons already named or to be named by me, in a writing under my hand as aforesaid, then and in that case I hereby appoint my said trustees in the meantime, until my said heritable subjects are turned into cash, and the heritable and moveable debts due to me received, and my legacies paid off, to pay annually, in the first place, the jointure to my said spouse, in case she shall survive me, and any other obligations I may have come under; and thereafter to divide proportionally among my legatees the free annual income and produce of my funds hereby disposed in trust, and that in proportion to the sums bequeathed to each of my legatees, and at such terms and times as my said trustees shall receive such annual proceeds, or so soon thereafter as may be."

WILLIAMSON  
OF  
THE  
ADVOCATE-  
GENERAL.

The said Archibald Robertson did also, upon the \*1st of June, 1812, duly make another testamentary instrument, containing the following among other clauses: "Know all men by these presents, that I, Lieutenant-General Archibald Robertson, of Lawers, considering that, by a trust-deed execute by me of my heritable and moveable estate and effects, generally and particularly therein described, bearing date the 29th day of November, 1799, to and in favour of, &c. (the trustees named), in trust always for the ends, uses, and purposes therein mentioned; and amongst others, my said trustees are required to turn my means and effects thereby conveyed in trust into money, and to content and pay, or assign and make over, to such person or persons as I shall name and appoint, by a writing under my hand, at any time of my life, and even on deathbed, such sum or sums of money, or proportion or proportions of the monies arising from the subjects thereby conveyed and disposed in trust to my said trustees: therefore, in terms of my trust-deed, and in the event of a child or children, whether male or female, being procreate of my body of my present or any subsequent marriage, and existing at the time of my death, then and in that case I hereby direct and appoint my said trustees, and the *quorum* of them, to bestow and employ the profits and produce of my said trust-funds, remaining after the payments of debts and expenses, for the use and behoof of the heirs of my body: declaring, that as soon as my heir shall be married or attain majority, then my said trustees shall be obliged to denude of my

[ \*7 ]

WILLIAMSON  
 v.  
 THE  
 ADVOCATE-  
 GENERAL.

[ \*8 ]

whole trust-estate and funds in favour of the heirs of my body, but to return to my said trustees, for the uses, ends, and purposes mentioned in the said trust-right, in case of the failure of heirs of my body, without otherwise disposing thereof after they shall have attained majority. But \*in the event of my decease without lawful issue of my body of my present or any subsequent marriage, or in case of the failure of heirs of my body, without otherwise disposing of my trust-estate and funds, then and in either of these cases, I hereby direct my said trustees, or *quorum* of them, to pay the sums of money after mentioned to the persons after named, out of my means and effects disposed and conveyed to them in trust; *videlicet*, to my dearly beloved wife Mrs. Catherine Austin, *alias* Robertson (over and above the jointure already settled by our contract of marriage), I bequeath the sum of 10,000*l.* sterling, to be entirely at her own disposal: I likewise hereby make over to her my right to any money or sums of money that she is or may be entitled to as one of the heirs of her late mother, the Honourable Mrs. Austin: I also hereby grant to her for her lifetime an annuity of 1,100*l.* sterling, and likewise the annuity she is entitled to from the Widows' Fund of the corps of his Majesty's Royal Engineers: I also bequeath to her, for the purpose of a jointure-house, with a stable and coach-house, leaving the house and situation to her own choice, with such bits of furniture as she may incline, the sum of 4,000*l.* sterling."

[ \*9 ]

After stating other bequests to his wife, and appointing annuities to different relations, and specific legacies to friends, the testator proceeded thus: "The residue of my means and effects, including the right to the fee of the sums vested and secured for the payment of the said annuities, so far as not otherwise disposed of by me, I hereby direct my said trustees to pay and make over to my two nieces Archibald Boyd Robertson and William (Wilhelmina) Boyd Robertson, as my residuary legatees, share and share alike, or to the heirs and assignees of my said nieces who may happen to survive me, but who may die \*before my said trustees may finally settle and wind up my trust-affairs: Declaring also, that the share of such of my residuary legatees as may die before me shall fall to the survivor of them, if not otherwise disposed of by me; which legacies to the persons before named, I direct my trustees to pay; and the same shall bear interest from the first term of Whitsunday or Martinmas after my decease, or at the first term of Whitsunday or Martinmas after the failure of heirs of my body, without otherwise

disposing of my trust-funds as before mentioned, or so soon thereafter, in either case, as my funds conveyed in trust can be converted into money; and the annuities to commence and run from the said term with the interest on the above legacies; but always with and under the provision and declaration as to the payment of interest on the legacies afore-mentioned, as is particularly contained in my said trust-deed, before my funds are turned into money. But declaring always, and it is hereby provided and declared, that in case my means and effects disposed in trust shall not, when turned into money, be equal or sufficient for the payment of the sums hereby appointed to be paid, then and in that case, each of the legacies to the persons above named (the legacies to my wife Mrs. Robertson excepted) shall suffer a proportional diminution or abatement, but not the annuities."

WILLIAMSON  
v.  
THE  
ADVOCATE-  
GENERAL.

On the 12th of February, 1813, the said Archibald Robertson died, without having left any heir of his body, leaving the before recited two testamentary instruments. The two nieces named in the last testamentary paper survived the testator, but one of them, Archibald Boyd Robertson, died in October, 1813.

The special verdict set out the property possessed by the testator at the time of his death, and found, that before July, 1814, the trustees had paid all the \*debts, funeral expenses, and legacies. The special verdict also set forth an account of the estate of the testator, to the following effect:

[ \*10 ]

The personal estate in possession amounted to	-	-	£30,000
A heritable bond, assigned by his trustees to a third party, amounted, with interest, to	-	-	20,800
			<hr/>
			50,800

The sums to be paid out of this personal estate were composed of the following items:

Debts and funeral expenses	-	-	-	£12,500
Legacies	-	-	-	20,700
Purchase of a house for his widow	-	-	-	4,000
				<hr/>
				37,200

The personal estate therefore exceeded the charges on it by the sum of	-	-	-	-	-	-	£13,100
							<hr/>

The landed estate was described in the special verdict as of the value of 52,446*l.*, producing a yearly rental of 2,166*l.*

WILLIAMSON  
 v.  
 THE  
 ADVOCATE-  
 GENERAL.

[ \*11 ]

Under these circumstances, the trustees did not think that they were required to sell the estate, because, although there were two annuities, the purchase of which, if bought, would have amounted to 21,175*l.*, yet, as they were made by the will charges on the income from the real estate, the trustees did not take them into the calculation they made as to the liabilities and assets of the personal estate. Miss William Boyd Robertson, the surviving niece of the testator, preferred taking the estate to having it sold; and the trustees, believing themselves to be invested by the words of the will with a discretionary power as to its sale, conveyed, by deed of the 25th July, 1814, the estate of Lawers to her in fee; she at the same time \*granting them a lawful and sufficient indemnity for so doing, binding herself to pay the annuities charged on the real estate; and thereupon she entered into possession of it. The Court below considered that the will did not give the trustees a discretion as to the sale of the estate, but required it absolutely to be sold; and so considering the will, treated the whole property as subject to legacy duty, which, by the decree, was ordered to be calculated on the whole, as originally bequeathed by the testator to his two nieces (1). The writ of error was brought against this judgment of the Court below.

*Mr. Simpkinson* and *Mr. Strathern Gordon*, for the plaintiffs in error [cited *Att.-Gen. v. Holford* (2); *Durie v. Coutts* (3); and *Cathcart v. Cathcart* (4)].

[ 15 ]

*Mr. Twiss* and *Mr. Romilly* appeared for the Crown, but were not called on.

LORD BROUGHAM :

My Lords, in this case I entertain no doubt whatever, and therefore I should suggest to your Lordships that the proper course will be at once to give judgment for the Crown. The question in this case arises upon the event which had happened, of General Robertson leaving no heirs of his body. Their Lordships in the Court below considered that, had he left heirs, the question could not have arisen: but we are relieved from all difficulty on that point by the fact that he did not leave heirs. He intended, probably, that

(1) It was admitted that, so far as the decree against the present appellant ordered the legacy duty to be calculated on the whole amount of the property bequeathed, it was in form

erroneous, and must be varied. That point was therefore not argued.

(2) 16 R. R. 737 (1 Price, 426).

(3) *Morr.* 4624—5595.

(4) 8 Shaw & D. 803.

if he left heirs there should not be a sale of his estate, except of such part as might be necessary to pay his debts, which would have been more than satisfied by the heritable bond and by the personalty, so that the great estate of Lawers should not be brought to sale in that event, but the trustees should denude themselves in favour of the heirs; but if there should be no heir of the body, then I think that in that case he intended that there should at all events be a sale. The whole question depends upon this, whether or not the will, or the two instruments in the nature of a will, taken together, amount to a direction to sell? If the language used by the testator amounts to a direction to sell the estate at his death, and that death takes place without his leaving heirs of his body, then the estate must be considered as money, and is to be dealt with as money, and the liability to legacy duty attaches. I think \*that in every respect it was money. In respect of the succession, it would go, not to the heir, but to the next of kin. If so, it was money in respect of revenue, and was liable to the payment of the duty; and nothing that took place after that could alter the rights of the Crown. The state of the property, whether land or money, at the time of the death of the testator, is the only question; and by that state at that time must be determined, both the rights of private parties,—with which we have nothing to do, except by way of argument and illustration,—and the right of the Crown, with which alone we have now any concern. My Lords, I think that, taking the whole of these instruments together, I can entertain no doubt whatever that the intention of the testator was, and that he contemplated nothing else than that, in the event of his death without leaving an heir of his body, the land should be brought to sale.

Then I come to consider the words of the will when treating of the property as residue. The testator says, “Let the whole of my means and effects,” in which he includes the produce from the sale of the land which he has appointed to take place, “be divided between my two nieces, Mrs. Archibald Boyd Robertson and Miss William Boyd Robertson, share and share alike, as residuary legatees.” I think that direction is important: it leaves very little doubt in my mind of what the testator assumed to be the case, and what he intended. I rely therefore on this direction, not merely on account of the words “residuary legatees,” although that expression clearly applies much more to whom a pecuniary residue is bequeathed, than to persons to whom an estate of inheritance is devised. I admit that the word “legatee” is sometimes used for “devisee,” as the

WILLIAMSON  
F.  
THE  
ADVOCATE-  
GENERAL.

[ \*16 ]

WILLIAMSON  
v.  
THE  
ADVOCATE-  
GENERAL.  
[ \*17 ]

expression “devise” is sometimes employed, \*though inaccurately, for “legacy.” But it is the general mode of dealing with the property that I look to. In the sentence I have quoted it is plainly dealt with as residue of the personalty.

I come then, lastly, to consider the way in which the testator has dealt with the property, and as it were explained his own previous intentions in the recital to the second deed. The recital in that deed expressly uses the word “required.” He says, “whereas, amongst others, my trustees are *required* to turn my means and effects thereby conveyed in trust into money.” It is a very good mode of construing an instrument, to take a man’s own words when the meaning appears doubtful (which, however, I am in this case disposed to deny); I think it is a good mode of getting at his meaning, to see what he himself thought he had done. Adopting this course, we find from his own expressions that he thought he had not merely conferred a power of sale, but had given an order to sell; for the word “required” is a stronger word than directed; it is, indeed, the strongest word that he could have used.

My Lords, these are the points on which it appears to me that the Court below has come to a right conclusion; and I am therefore of opinion that your Lordships ought, without hearing the counsel for the defendant in error, to affirm the decree, and to give judgment for the Crown. I will only say one word upon the cases which have been cited. *In re Evans* (2) is completely distinguishable from the present. In that case the expression used was, “sell such part of the estate as may be wanted for the purpose of paying the debts,” and then deal so and so with the residue. Here the direction is, “sell the whole whether it may be wanted or not, and deal with the residue in a manner \*totally different from that of dealing with the estate; give it not to the heir-at-law, but to the next of kin.” In that case it was not an estate of personalty at all with which the trustees had to deal, it was a charge upon the realty; here it is an estate of personalty.

[ \*18 ]

Then, as to the case which has been cited of *Durie v. Coutts* (1), the words there are, “if he shall think fit;” words giving the trustee a discretion whether he will sell or not; there are no such words here. The author of that deed would never have said, “whereas I have *required* my trustees to sell;” he would have said, “whereas I have empowered my trustees to sell;” it was a mere power to sell, and nothing else. Then comes the case of *Cathcart v. Cathcart* (3),

(1) Morr. 4624.

(2) 2 Cr. M. & R. 206.

(3) 8 Shaw & D. 803.

which was a totally different case, for there the person to whom the estate was made over was the heir-at-law.

My Lords, I am therefore clearly of opinion that in this case we have nothing to do but to give judgment for the defendant in error, with the variation which is now admitted must be made in the amount of the duty payable.

WILLIAMSON  
v.  
THE  
ADVOCATE-  
GENERAL.

LORD COTTENHAM:

My Lords, I am entirely of the same opinion. It was alleged by the learned counsel for the appellant that this case turned upon that which was a common question in the Courts of this country; whether this amounted to a conversion of the real property out and out into personalty, or whether it was to be considered as a discretion to sell for the purpose of paying off certain charges, debts, and so on? That is the criterion by which questions of this sort are to be determined. The \*decision turns upon the opinion formed (varying of course in the different cases according to the expressions used) upon the question, whether it falls under one denomination or another? Looking at these instruments, it does not appear to me that they admit of a doubt. It is not necessary that the words of the power should contain an absolute direction to the trustees to sell. The intention of the testator must be gathered from all the provisions of the deed, and I cannot find any provisions in that deed which raise any question as to the intention of the author of the instrument, or which indicate any desire that the estate should be sold only in the event of the ultimate failure of heirs of his body. In that power, he says that it shall be executed as soon as convenient; and then he proceeds to give the surplus of the property, which he describes in terms that show him to have considered that he was dealing with money the produce of the sale of the lands in specie, and he provides in terms which are very significant for the interim management of the property. Taking all these expressions together, I apprehend that no doubt can be raised upon the terms of the first deed.

[ \*19 ]

That brings us to the consideration of the second deed. In that he puts a construction on what he has done in the first; he says that he had required the trustees to turn the estates into money. If this had been a case in an English court of equity, and the question had been whether it was a power of conversion of the estate out and out, there is no case within my recollection that would throw a doubt upon that subject. And cases have occurred in Scotland, which



WILLIAMSON  
v.  
THE  
ADVOCATE-  
GENERAL.  
[ \*20 ]

show that the rule of decision there has been founded upon the same principle as in this country ; and, therefore, that the law is the same in both. It appears to me, my Lords, \*that the two instruments, taken together, give a direction to sell and convert the estate from land into money ; and therefore the gift which is the subject of the present appeal is, for the purpose of the legacy duty, to be considered as a gift of money and not as a gift of land.

LORD CAMPBELL :

My Lords, it is quite sufficient for me to say, that looking at these deeds, I am thoroughly convinced that General Robertson intended that if he died without leaving a son, the estate of Lawers should be sold. He did die without leaving a son, and no discretion was then vested in the trustees under these deeds ; they were bound to sell, and therefore this estate is to be considered liable to the duty. This case is entirely distinguishable from those which have been cited, where the trustees were merely invested with a power which, in their discretion, they might or not think fit to exercise ; and where, therefore, there was merely a charge on the real estate, not a positive direction to convert that estate into personalty. My Lords, I have had the great advantage of reading the able and luminous judgments of Lord JEFFREY and Lord CUNINGHAME ; they seem to me to have reasoned the case with great ability and in the most satisfactory manner, and I entirely concur with the views which they took of the provisions to be found in these two instruments.

*Mr. Twiss* asked for costs to be given to the Crown.

LORD BROUGHAM :

The whole of the judgment of the Court below cannot be sustained. It is so far wrong as it gives the duty payable on the whole estate.

[ 21 ]

*Mr. Twiss* said that the sum in the verdict had been arranged between the parties. The full sum had been inserted by mistake.

LORD BROUGHAM :

But it is expressly stated in the judgment, to which alone this House can look. The expense of the hearing might perhaps have been saved, had there been a consent beforehand to certify the error.

(It was ordered and adjudged that the judgment of the Court below be affirmed, but with this variation, that her Majesty may have execution against the said William Boyd Robertson Williamson for the sum of 1,249*l.* 2*s.* 0½*d.*, being the amount of duty payable by the said W. B. R. Williamson, by consent of parties, instead of for the sum of 2,500*l.* in the said judgment mentioned: and that the record be remitted, to the end that such proceedings may be had thereupon as to law and justice shall appertain.)

WILLIAMSON  
r.  
THE  
ADVOCATE-  
GENERAL.

## REES PRICE *v.* ROBERT BENTON SEELEY AND OTHERS.

(10 Clark & Fennelly, 28—41.)

1848.  
May 11.

Lord  
CAMPBELL.  
Lord  
COTTENHAM.  
[ 28 ]

Trespass—Breach of the peace—Arrest—Justification—Practice on appeals to House of Lords.

A private person is not justified in arresting, or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.

A plea, justifying an arrest for an affray without warrant, ought to contain a direct averment that there was an affray or a breach of the peace continuing at the time of the arrest, or a well-founded apprehension of its renewal.

A plea of justification to an action of trespass for assault and false imprisonment,—after stating that defendants were in lawful possession of a yard, and were there erecting a wall by their servants; that plaintiff entered the yard and upon the wall, and made a great noise, disturbance and affray, ill-treated defendants, threw down their servants so employed, and obstructed the erection of the wall, in breach of the peace; then averring a requisition by defendants to plaintiff to depart, and his refusal and continuance; whereupon defendants and their servants gently removed him, and he violently resisted, and assaulted one of defendants in so doing,—proceeded thus: That plaintiff then and immediately afterwards, and just before the said time when, &c., with force, &c., again broke and entered the yard and got upon the wall, and again made a great noise, disturbance, and affray therein, and threatened to assault, insulted, and ill-treated and showed fight to defendants, and then again forcibly obstructed the further erection of the said wall, and threw down part thereof, &c. in breach of the peace; whereupon defendants, having view of the offences and misconduct of plaintiff last aforesaid, in order to prevent such breach of the peace &c., then and there gave charge of the plaintiff to a police constable, who then saw the misconduct of plaintiff, to take him before a justice; and the policeman took him before a justice.

Held, that these were sufficiently positive averments of a continuing breach of the peace from the commencement until the plaintiff was given in charge, or amounted to a necessary implication of a well-founded apprehension that it would be renewed.

The Standing Order, No. 58 (1), directing “that no person shall sign an

PRICE  
v.  
SEELEY.

appeal to this House unless he was of counsel in the same cause in the Courts below, or shall attend as counsel at the hearing at the Bar of this House," is not to be departed from, although there may be cases in which exceptions will be allowed.

[ \*29 ] THIS was a writ of error on a judgment of the Exchequer Chamber, which affirmed a judgment of \*the Court of Queen's Bench, under the following circumstances:

In Easter Term, 1839, the plaintiff in error brought an action against the defendants in error, in the Court of Queen's Bench: the declaration contained two counts, the first stating an assault, battery, and false imprisonment of the plaintiff by the defendants; and the second stating an assault and battery.

The defendants severed in their pleas: the said R. B. Seeley and five other defendants, pleaded,—

1st. Not guilty to the whole declaration.

2ndly. As to the second count, a justification (on which no question arose).

3rdly. As to the first count also, a justification, stating that four of them, with other persons, being trustees under an Act of 10 Geo. IV. for taking down and rebuilding St. Dunstan's Church, were, as such trustees, lawfully possessed of a certain close or yard, with the appurtenances, situate and adjoining to Clifford's Inn, in the city of London, in which close certain persons, with the authority of the said trustees, were, before and at the said times when, &c., constructing a wall, by Thomas Winney and Thomas Lee, their servants in that behalf; and the said trustees being so possessed, and the said servants being so employed, the plaintiff, just before any of the said times when, &c., in the said first count mentioned, came into the said close or yard, and upon the said wall so constructing as aforesaid, "and then and there with force and arms made a great noise, disturbance, and affray therein and thereon, and insulted, threatened, abused, and ill-treated the said last-mentioned defendants so being such trustees as aforesaid, and also the said George Colk, one of these defendants, in the said \*close or yard respectively; and then with force and arms assaulted and pushed about and threw down the said T. Winney and T. Lee, being such servants employed in constructing the said wall as aforesaid, and then greatly disturbed and disquieted the said trustees in the peaceable and quiet possession of the said respective close or yard, and forcibly hindered and obstructed the erection of the said wall there, in breach of the peace of our lady the Queen; whereupon the last-mentioned

[ \*30 ]

defendants, R. B. Seeley, &c., being such trustees as aforesaid, requested the said plaintiff to cease his said noise, violence, hindrance, and disturbance, and to depart from and out of the said close or yard and wall respectively; which the plaintiff then wholly refused to do, and continued his said noise, violence, hindrance, and disturbance. The last-mentioned defendants, so being such trustees as aforesaid, then and just before the said times when, &c., in defence of the possession of their said close or yard and wall, and the said George Colk, Cyrus Elliman, and Thomas Eaves, as their servants in that behalf and by their command, and the defendants did gently lay their hands on the plaintiff, in order to remove, and did then remove the plaintiff from and out of the said close or yard of the said trustees, and off the said wall, as they lawfully might for the cause aforesaid; the plaintiff with force and arms violently resisted the said removal, and assaulted, beat, and ill-treated the said T. Eaves in so doing, in further breach of the Queen's peace: and the said defendants further say, that the plaintiff then immediately afterwards, and just before the said times when, &c., with force and arms, &c., again broke and entered the said close or yard, and got upon and over the said \*wall, and again made a great noise, disturbance, and affray therein and thereon, and threatened to assault, and insulted and abused and ill-treated, and showed fight to the defendants, being such trustees as aforesaid, and the said servants, in the said close or yard; and then again forcibly obstructed and hindered the further construction of the said wall thereon, and forcibly kicked and threw down a part of the same already built, and greatly disturbed and disquieted the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the Queen; whereupon the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid, and the said G. Colk standing by and also having such view as aforesaid, in order to preserve the peace, and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively, and to proceed peaceably, quietly, and undisturbedly in the construction of the said wall, then and there gave charge of the plaintiff to the said T. Eaves, then being a police-constable of and for the city of London, who then saw and had view of the said misconduct and breach of the peace committed by the plaintiff as last aforesaid, and

PRICE  
v.  
SEELEY.

[ \*31 ]

PRICE  
SEELEY.

[ \*32 ]

then requested the said policeman to take the plaintiff into his custody and carry him before some justice or justices of our lady the Queen, assigned to keep the peace in and for the said city of London, to answer the premises and to be dealt with according to law; and the said policeman, being such constable as aforesaid, at such request of the last-mentioned defendants, and the said Cyrus Elliman, in his aid and assistance and by his command, then and there gently laid hands on the plaintiff for the \*cause and purpose aforesaid, and did then and there take the plaintiff into custody and conduct him from and out of the said close or yard, in order to carry and convey him before such justice as aforesaid." The plea then proceeded to allege that the trespasses were committed in so doing and in overcoming plaintiff's resistance to the constable; with an averment that as little damage was done to plaintiff and his clothes as might be, and that the trespasses all took place in the city of London.

The defendant Eaves, a London policeman, pleaded,—1st. Not guilty by statute.

2nd and 3rd. Justifications, on which no question is raised in this writ of error.

The plaintiff joined issue on all the pleas of not guilty, and replied *de injuria*, &c. to the special pleas; whereupon issue was joined.

The cause was tried before Lord Denman at the London sittings after Michaelmas Term, 1839, when the jury found for the plaintiff on the general issue, with one shilling damages; and for the defendants on the pleas of justification. A motion to arrest the judgment was afterwards made, but the Court directed the judgment to be entered for the defendants. The plaintiff brought his writ of error in the Court of Exchequer Chamber, where the judgment of the Court of Queen's Bench was affirmed (1). The plaintiff then brought the present writ of error in this House.

Mr. Fitzroy Kelly and Mr. Fry, for the plaintiff in error :

[ \*33 ]

It appears from the evidence that at the time the trespasses complained of in the declaration were \*committed, the plaintiff was only protecting the adjoining premises of his daughter against the encroachments on them by the defendants, in the building of their wall. The question, however, for the consideration of the House

does not arise on the merits, but on the pleadings. The plea of justification to the first count of the declaration, is insufficient in law to bar the plaintiff's right of action for the trespasses alleged in that count. Those trespasses are admitted by the plea; and the matters alleged by way of justification are, on the face of the averments, not sufficient to justify them. It is averred that Eaves endeavoured to apprehend, without averring that he had a warrant or other authority for that purpose, or that there was any sufficient reason for his interference. The altercation and disturbance between the plaintiff and the defendants had ceased when the former was given in charge to Eaves. The law on this point is clearly laid down in a well-considered judgment by Mr. Baron PARKE, in the case of *Timothy v. Simpson* (1). That, like the present, was an action of trespass for an assault and false imprisonment, to which there was a special plea that the defendant was possessed of a dwelling-house, and that the plaintiff entered the house and made a great disturbance and affray therein, &c., whereupon the defendant requested the plaintiff to cease his disturbance and to depart, which the plaintiff refused to do, and continued in the house making the said disturbance and affray, whereupon the defendant, in order to preserve the peace, gave charge of the plaintiff to a policeman, who took the plaintiff into custody. Mr. Baron PARKE considered that plea to be bad in law, and he laid down the law in these terms: "It is unquestionable that any bystander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it, and may arrest the affrayers and detain them till the heat be over, and then deliver them to a constable, who may carry them before a justice of the peace." It appears from this clear statement of the law on the point, that it is a material circumstance whether a breach of the peace is committed in the presence of the party giving charge of the affrayer, or whether the affray which he witnessed ceased and it is likely to be renewed; for any person may apprehend the breaker of the peace during the affray, and also after it ceased if there is reasonable ground to fear it will be renewed. But where there is no continuing affray, and no reasonable ground to apprehend its renewal, no person is justified in arresting a party.

PRICE  
v.  
SEELEY.

[ \*34 ]

(LORD CAMPBELL: Your general law will not, I suppose, be

(1) 40 R. B. 722 (1 Cr. M. & R. 757).

PRICE  
v.  
SEELEY.

controverted on the other side. One private person has no right to give another in charge after the disturbance has ceased.)

[ \*35 ]

It will not be necessary, therefore, to trouble the House with more cases on that point, except only by a reference to the case of *Cook v. Nethercote* (1), at the trial of which Mr. Baron ALDERSON charged the jury to this effect: that to justify a constable in apprehending a party for an affray, without a warrant, it is necessary that the constable should have had view of the affray while the party was engaged in it, and that it was still continuing at the time of his apprehension. If the "affray was over, then the constable had not and ought not to have the power of apprehending the persons \*engaged in it; for the power is given him by law to prevent a breach of the peace, and where a breach of the peace had been committed and was over, the constable must proceed in the same way as any other person, namely, by obtaining a warrant from a magistrate" (2). The law being, as clearly laid down in those cases, that a private person has no right to apprehend unless the affray is continuing or there is reasonable apprehension of its renewal, the defendants, who admit by their plea that they apprehended the plaintiff and took him before a magistrate, are bound to allege distinctly the facts required by law for their justification. The justification of a continuing or renewed breach of the peace must be positively stated, not alleged by way of inference or reasoning. This plea does not distinctly state that there was a continuing affray, and is therefore insufficient in form.

(LORD CAMPBELL: There is a direct averment of a breach of the peace: "Whereupon the defendants, having view of the misconduct of the plaintiff, in order to preserve the peace and restore order and tranquillity, and to prevent such breach of the peace," gave charge of the plaintiff.)

"Whereupon" is not a term showing that a breach of the peace was continuing at the time the plaintiff was taken into custody.

(LORD COTTENHAM: The words "whereupon," &c. imply that a breach of the peace was continuing.)

The words do not necessarily imply a continuing state of things amounting to a breach of the peace. "Whereupon" is an equivocal

(1) 40 R. R. 855 (6 Car. & P. 741).

(2) 40 R. R. 855 (6 Car. & P. 744).

word, has no fixed definite legal meaning, and is not precise enough in \*pleading. A coroner's inquisition has been quashed in consequence of the word "instantly," used in it, not being definite enough to signify "then and there." So "whereupon" is insufficient, as not having acquired a definite legal meaning. There are instances of arrest of judgment, where the language of the plea was loose and indefinite: *Sweetapple v. Jesse* (1), *Jackson v. Peaked* (2).

PRICE  
v.  
SEELEY.  
[ \*36 ]

The *Attorney-General*, Mr. W. H. Watson, and Mr. Peacock, appeared for the defendants in error.

LORD COTTENHAM :

It does not appear to us, *Mr. Attorney*, that we should call upon the defendants in error in this case. The law, as stated by *Mr. Kelly* from the judgment of Mr. Baron PARKE, in the case of *Timothy v. Simpson*, is perfectly correct. The question is, whether this third plea comes within the rule of law there laid down? That plea states the forcible expulsion of the plaintiff from this ground, and then proceeds to allege that he "with force and arms violently resisted the said removal, and assaulted, &c. the said T. Eaves in so doing, in further breach of the Queen's peace: and the said defendants further say that the plaintiff then immediately afterwards, and just before the said times when, &c., again broke and entered the said close, &c., and again made a great noise and affray therein, and threatened to assault, and insulted, &c., and showed fight to the defendants, &c., and then again forcibly obstructed and hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed the said trustees, &c., in breach of the peace of our lady the Queen; whereupon \*the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff aforesaid, and the said Colk standing by and also having such view as aforesaid, in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace and to proceed quietly and undisturbedly in the construction of the said wall, then and there gave charge of the said plaintiff."

[ \*37 ]

Now that appears to me to be going a great deal further than it need have gone, according to Mr. Baron PARKE's judgment; for

(1) 39 B. R. 374 (5 B. & Ad. 27).

(2) 14 R. R. 417 (1 M. & S. 234).



PRICE  
\*  
SEELEY.

[ \*38 ]

this is all one continued act. The party who makes this invasion of the premises, where the wall was being constructed, did not evidently desist from that breach of the peace in which it is admitted he was engaged. But being forcibly expelled from the premises, he again comes on them, again does that which the word "affray" is used to represent, threatens to renew the assault, and proceeds again with the work he had been originally engaged in when he was removed, namely, destroying the wall partly erected: all which acts are in the plea distinctly alleged to be against the peace of the Queen. Then the act which is the subject of the charge is stated: "Whereupon, in order to preserve the peace and to restore order and tranquillity," &c. The argument is, that the word "whereupon," coupled as it is with the subsequent statement, must be, or may be, intended to mean that the affray and breach of the peace had entirely ceased, and that after it had ceased the party was given in charge to the constable; a course of proceeding which a private individual is not entitled to adopt. But the allegation is, after narrating the facts amounting to a continued breach of the peace, that "whereupon," &c., to prevent the continuance of \*the disturbance, the party was given in charge. Now I apprehend that the statement there would amount to the allegation of a continued breach of the peace from the very commencement up to the moment when the party was given into custody. It amounts to that which is deemed sufficient, if the party at the time the arrest took place had ground to believe that a breach of the peace was either continuing or likely to be renewed. Here is a party who comes on the premises, commits a serious breach of the peace, is forcibly driven out, immediately re-enters, and continues the same description of conduct for which he had been previously removed. If language can express acts calculated to raise impressions that a breach of the peace was either to be continued or repeated, it does appear to me that those words amply amount to such an allegation; and, under the authority referred to, that would be sufficient to justify the arrest which took place. I therefore think that the judgment must be for the defendants in error.

LORD CAMPBELL:

This appears to me to be a frivolous writ of error. I understand there was an application that the Queen's Judges should be here, and it was supposed to be a matter of course that they should

PRICE  
C.  
SEWLEY.

be here. Now your Lordships are extremely anxious in a grave case, upon a question of common law, to have the assistance of those reverend sages of the law, and to pay great attention to them; although your Lordships are not bound by their opinion. But to have summoned her Majesty's Judges on such a case as this would have been, as it appears to me, extremely preposterous. It should be understood that when there is a motive to summon the Judges, and your Lordships think their attendance necessary, they are generally summoned; but it is by no means necessary \*when there is a writ of error that the Judges should be summoned.

[ \*39 ]

It seems to me that the counsel for the plaintiff in error very correctly stated in the course of his argument what is the law on this subject. A private person is not justified in arresting any of the Queen's subjects, unless there be a breach of the peace continuing, or unless he has reasonable ground to believe that a breach of the peace, which has been committed, will be renewed: and it was stated, I think very correctly, that in a plea justifying an arrest and imprisonment, there ought to be a direct averment that there was a breach of the peace continuing, or that there was a well-founded apprehension of its renewal. When I look at this plea, I think that both are positively averred. I cannot at all dismiss from my consideration the first part of this plea; for I think with my noble and learned friend that this is to be taken as part of the same transaction, for there was no cessation at all of the conduct of the plaintiff, and it is positively averred that the plaintiff, "then immediately afterwards and just before the said times when, &c., with force and arms, &c., again broke and entered the said close, &c., and again made a great noise, &c., and threatened to assault, and insulted and abused and ill-treated and showed fight to the defendants:" which last is an expression I never saw in pleadings before, but the meaning of which I apprehend is pretty well understood: "and then again forcibly obstructed and hindered the further erection of the said wall, and forcibly kicked and threw down a part of the same already built, and greatly disturbed, &c. the said trustees in the peaceable and quiet possession of the said close or yard, in breach of the peace of our lady the \*Queen." Here is a positive averment that these acts were done in breach of the Queen's peace; and can it be contended that it is possible to have an affray not in breach of the Queen's peace? Then there can be no doubt that in that part of the plea all that is necessary is positively averred.

[ \*40 ]

PRICE  
\*.  
SEELEY.

Now let us see whether the continuation of that breach of the peace at the time of the arrest is not likewise averred. The plea goes on thus: "Whereupon the last-mentioned defendants, being such trustees as aforesaid, and having view of the said offences and misconduct of the plaintiff last aforesaid, &c., in order to preserve the peace and to restore order and tranquillity, and to prevent such breach of the peace in the said close or yard respectively." Then a breach of the peace had been committed; whereupon, in order to restore tranquillity and to prevent such breach of the peace being renewed, the arrest took place. Here is a positive averment that it was continuing; and further, if we could suppose that it had ceased, which I think there is no reason for supposing on this statement, there are facts which are abundantly shown from which it is not a mere matter of doubtful inference, but a necessary and inevitable implication according to the grammatical and usual sense in which language is employed, that there was a well-grounded apprehension that that breach of the peace would be renewed, and it was in order to prevent such renewal of it that the arrest took place. I am clearly of opinion that this writ of error is brought without reason, that it is frivolous and vexatious, and that there ought to be judgment for the defendants, with costs.

LORD COTTENHAM:

[\*41]

With respect to the question raised by the *Attorney-General* at the Bar, with regard \*to the counsel who signed the case not appearing to argue it (1), it must not be supposed that that rule of the House is to be departed from; because it is essential to the due administration of justice that this House should have the sanction of the counsel in the Court below, or of those who appear at this Bar, for the purpose of maintaining any proceedings brought here by appeal or writ of error. There has been sufficient reason stated why the House should not insist on the rule in this case; but it must not be understood that the rule is to be at all broken in upon or weakened.

*The judgment of the Court below was then affirmed,  
with costs.*

(1) On the opening of the case by *Mr. Kelly*, the *Attorney-General* stated to the House that neither of the two counsel whose names were sub-

scribed to the printed case of the plaintiff in error, was counsel in the cause in the Court below, or attending as counsel in it at this Bar.

JOHN JAMES HOPE JOHNSTONE, GEORGE  
GRAHAM BELL, JAMES HOPE STEWART,  
AND WILLIAM STEWART *v.* MARY STEWART  
BEATTIE, AN INFANT.

(10 Clark & Finnelly, 42—153.)

Jurisdiction—Foreign infant—Appointment of guardian (1).

The guardians of a foreign infant duly constituted by the law of the infant's domicile have no power or authority over the infant in England.

A foreign infant resident in England may be made a ward of Court when that course is for the infant's benefit.

In appointing guardians of a foreign infant, who is resident in England, the Court is not bound to recognise and confirm a foreign guardianship already constituted by the law of the infants' domicile (*dis.* Lord Brougham and Lord Campbell).

Where guardians of a foreign infant are appointed by an English Court it is necessary that one of those guardians shall be subject to the jurisdiction of the Court.

If the bill filed to make an infant a ward states facts, giving the Court jurisdiction, the infant is at once a ward under the protection of the Court, before any proceeding is had in the cause, and before any guardian is appointed.

THE suit, in which this appeal arose, was instituted for the purpose of obtaining the appointment, by the Court of Chancery, of guardians to the respondent, \*who was a Scotch young lady about the age of six years, and an orphan, residing in England, and possessed of considerable landed property in Scotland, but without any property in England or Wales. The appellants were Scotch gentlemen, regularly constituted tutors and curators of the infant by the testamentary appointment of her father, a domiciled Scotchman; and they had duly accepted that office. The question for decision was, whether the Court of Chancery in England could, consistently with the laws and rules which govern the proceedings of that Court in such cases, disregard the authority of those tutors, and place the young lady under the exclusive control and protection of guardians appointed by the Court.

The facts were these: Thomas Beattie, Esq., the father of the young lady, was a Scotch gentleman, born of Scotch parents, possessed of no property in England or Wales, but possessed of an estate at Crieve, in the county of Dumfries, of the value of 2,300*l.* per annum, subject to certain burthens charged thereon, and also of some other property in Scotland. He married a lady of the name

1843.  
March 27, 28.  
May 16, 26.

Lord  
LYNDHURST,  
L.C.

Lord  
BROUGHAM.

Lord  
COTTENHAM.

Lord  
CAMPBELL.

Lord  
LANGDALE.

[ 42 ]

[ \*43 ]

(1) But the status of a foreign or intruder: *Stuart v. Lord Bute* (1861) guardian is not ignored in England. 9 H. L. C. 440; *Nugent v. Vetzera* (1866) L. R. 2 Eq. 704.—O. A. S.

JOHNSTONE  
v.  
BEATTIE.

of Christina Stewart, a Scotch woman, also born of Scotch parents, and possessing no property in England or Wales, but entitled to a life interest in an estate called the Glen-Morven estate, of the value of 700*l.* per annum, in the county of Argyll. In the year 1835, the respondent was the only surviving child of the marriage. Her father, having been advised to go to Madeira for the benefit of his health, before his departure executed the following deed, dated the 3rd of October, 1835, and signed by two witnesses :

[ \*44 ]

“ I, Thomas Beattie, Esq., of Crieve, judging it to be proper and expedient to appoint tutors and curators \*to the surviving child procreated, or the children to be procreated betwixt me and Christina Stewart or Beattie, my spouse, as shall happen to be within the years of pupillarity or minority at the time of my decease; therefore, I hereby nominate and appoint the said Christina Beattie, my spouse, and John James Hope Johnstone, Esq. (the first appellant; seven other gentlemen were then named, including the other appellants), to be tutors and curators to Mary Stewart Beattie, the child already procreated betwixt me and the said Christina Beattie, and to any other children to be procreated of my body, whether male or female, of my present marriage; declaring that the majority of the above-named persons accepting and surviving, and resident in Great Britain at the time, shall be a *quorum*, while there are more than two surviving; and in case they shall be reduced to two or one, the whole office shall be vested in such surviving persons or person, with power to appoint factors, &c., and generally to do every other act and deed in the management of the affairs of my said child or children competent to tutors and curators by the law of Scotland, &c.”

[ \*45 ]

Shortly after executing this deed, Mr. Beattie, with his wife and child, went to the island of Madeira, where he died in the month of April, 1836; whereupon his widow and the appellants alone, out of the persons named in the deed, accepted the office of tutors, the other persons named therein having declined to act. By this means the widow and the appellants became the sole tutors testamentary of the infant, and became bound by the law of Scotland to continue such tutors until she should attain her age of twelve years, \*when they would become curators, and so continue until she should attain her age of twenty-one years. The appellants proceeded forthwith to perform the duties so reposed in them, and to manage the estate and affairs of the infant in Scotland, and complied with the requisites of the law of Scotland relating to such matters.

Mrs. Beattie, soon after the death of her husband, left the island of Madeira, and arrived in England with her daughter on the 5th of June, 1836. In the end of that month they went to Scotland, and resided for a short time at the family mansion in Dumfriesshire. In the month of November of the same year, they went to Chester, where Mr. Duncan Stewart, Mrs. Beattie's father, then resided, he being collector of the customs there. Mrs. Beattie afterwards brought her daughter to London, but soon returned to Chester, and resided there for a year; after which she came again to London, and resided for a year in a hired furnished house in Avenue Road, Regent's Park, and afterwards in a rented house furnished by herself in Albion Street, Hyde Park, having occasionally for short periods gone with her daughter to Hastings, for the benefit of the health of both.

JOHNSTONE  
v.  
BEATTIE.

Mrs. Beattie made her will in October, 1840, by which she appointed Adam Johnstone and Dr. Frederick Quin her executors, and bequeathed all she possessed to her father for his life, and after his death to her brothers. The will contained this passage: "My daughter is amply provided for; but it is my earnest request and prayer that she should be allowed to reside with her grandfather and my aunt Mrs. Buchanan, and that my co-trustees should not make any attempt to diminish the full allowance from Crieve and Glen-Morven during her minority. My daughter \*unluckily inherits, from both her father and mother, most delicate health, and will require every comfort and care to rear her to maturity; and I most earnestly implore the gentlemen of the trust to prefer my dear child's health and comfort to any saving for a fortune, which her delicate constitution, if not properly attended to, may never allow her to reach. I am now writing from a bed of sickness, from which it may be God's decree that I never rise; and I would fondly believe that the gentlemen of the trust will not have the heart to lend a deaf ear to this last appeal of a mother for her orphan child. May God forbid that my own desire that my daughter should pass her minority in the house and under the care of her natural protector and nearest blood relation, her grandfather, should meet with dissent: it is my dying request that she should have a governess in her grandfather's house, and never be sent to a boarding-school."

[ \*46 ]

Mrs. Beattie died in Albion Street, on the 21st of December, 1840. Immediately after her death, the appellant James Hope Stewart, by the desire of the other appellants, came to London, and

JOHNSTONE  
r.  
BEATTIE.

made the necessary arrangements for the care of the infant, and for her remaining in England, which was considered by her medical advisers to be necessary for her health. He engaged a Miss Wells as a governess for her, that lady having been approved of and about to be engaged by Mrs. Beattie at the time of her death; and he continued an old confidential servant to attend upon the infant as she had done theretofore, and left her also in the care of Miss Janet Graham Stewart, who was a relation of Mrs. Beattie and sister of two of the appellants, and who had, at the request of Mrs. Beattie, resided with her during her last illness. The appellant

[ \*47 ]

\*J. H. Stewart returned to Scotland the 1st of January, 1841, having previously arranged, provided his co-tutors should agree thereto, that Mrs. Buchanan, the aunt of Mrs. Beattie mentioned in her will, should come from Scotland and take charge of Miss Beattie until the close of the term for which the house in Albion Street had been taken, which was to June or Michaelmas, 1841.

On the 6th of January, 1841, Mr. Duncan Stewart, the infant's grandfather, without any notice to the appellants, filed a bill in the Court of Chancery, in the name of the infant as plaintiff, by himself as her next friend, against the appellants and the said executors Adam Johnstone and Frederick Quin, stating the matters before mentioned; and also that the appellants and Mrs. Beattie, as trustees of the Scotch estates, had received the rents and profits of said estates to a considerable amount, and that the appellants had in their hands considerable sums of money on account of the said rents received by them in trust for the infant since her father's death, and that there was a considerable sum due to her on the like account from her mother's estate, possessed by her said executors. The bill further stated, that all the appellants resided in Scotland, out of the jurisdiction of the Court, and that there was no person within the jurisdiction empowered to act as guardian of the plaintiff, or to receive the rents and profits of the said estates, or apply them for the maintenance and benefit of the plaintiff; that her father had no legal relative at the time of his death; that the said Duncan Stewart, her mother's father, was her nearest living relative, and the said Mrs. Buchanan was another of her nearest relatives; that both these were to be permanently resident within the jurisdiction, and the plaintiff was \*always on terms of intimacy and affection with them, and was desirous that they should be appointed to act as her guardians. The bill prayed that the fortune and person of the plaintiff might be placed under the

[ \*48 ]

protection of the Court, and that Mr. Duncan Stewart and Mrs. Buchanan, or some other proper person or persons, might be appointed to be or to act as guardians or guardian of the plaintiff, and that all proper directions might be given for her maintenance and education; and that accounts might be taken, under the direction of the Court, of all the rents and profits of the said estates received by the appellants and Mrs. Beattie, deceased, as such trustees as therein mentioned, or by their order, &c., since the death of Mr. Beattie; and that the appellants, and the defendants Johnstone and Quin as the executors of Mrs. Beattie, might be decreed to pay into Court, for the benefit of the plaintiff, what, upon taking such accounts, should appear to be due from them respectively, &c.; and that all other accounts might be taken and directions given which should be necessary for properly effectuating the purposes of the suit.

JOHNSTONE  
&  
BEATTIE.

On the same day that the bill was filed Mr. Duncan Stewart presented a petition in the cause, in the name of the infant, containing the same statements as were contained in the bill, and praying that he and Mrs. Buchanan might be appointed to be or to act as guardians of the petitioner; and that it might be referred to the Master to inquire and state to the Court the infant's age and the nature and amount of her fortune, and what would be fit and proper to be allowed for her maintenance and education during her minority, and from what past period such allowance should commence, and out of what fund it should be taken. This petition was supported by an affidavit, which \*contained statements to the same effect as the statements contained in the petition, and testified the fitness of Mr. D. Stewart and Mrs. Buchanan to be guardians. And also on the same day, on the *ex parte* application of the infant's counsel, the VICE-CHANCELLOR made an order appointing Mr. Duncan Stewart and Mrs. Buchanan to act as guardians of the infant, and referred it to the Master to inquire and state, &c., as prayed by the petition.

[ \*49 ]

The appellants, shortly after this order had been obtained from the Vice-Chancellor, were informed of the proceedings which had taken place; and having then appeared to the bill, they in February, 1841, presented a petition to the Lord Chancellor, setting forth, among other matters before mentioned, the aforesaid deed of Mr. Beattie appointing them tutors and curators of his child, and stating their own powers and duties acting under that appointment in the events which happened, and other grounds on which they



JOHNSTONE  
v.  
BEATTIE.

conceived that the order of the VICE-CHANCELLOR was erroneous. The petition—after further stating that Mrs. Beattie did not by her will give any property to the infant; that there was nothing due to the infant from her mother's estate; that the infant had not acquired any English domicile, and had no property whatever in England; that in all the arrangements made by the petitioners for the education of the infant and management of her property, they considered solely what was most for her benefit, and they were perfectly able and willing to take care of her during her residence in England—prayed that the said order might be discharged or varied; and that if his Lordship should think it proper to interfere touching the guardianship of the infant, the appellants might be declared to be, or, if they were not already such, might \*be appointed to be guardians of the infant: but if his Lordship should think fit to interfere touching the guardianship, and should not think it fit to declare or appoint the appellants to be such guardians, then that his Lordship would be pleased to make such other order, by way of reference to the Master or otherwise, as to his Lordship should seem meet, having regard to the said testator's testamentary disposition, to his domicile, and to the circumstances and situation of the property of the infant; or that his Lordship might make such other order as the circumstances of the [case] might require.

[ \*50 ]

This petition also came on to be heard before the Vice-Chancellor on the 19th of March, 1841; and after hearing the matter fully debated on both sides, and hearing the several affidavits by which the petition was supported and opposed, his Honour ordered that his former order, dated the 6th of January, should be discharged, and that the appellants should be appointed to act as guardians of the infant during her minority or until the further order of the Court, without prejudice to the question whether the appellants were entitled to the guardianship of the infant, under the statute 12 Car. II. c. 24, s. 8.

Mr. Duncan Stewart, in the name of the infant, presented a petition of appeal from this last order, to the Lord Chancellor; and this petition came to be heard before his Lordship on the 17th of April, 1841, when his Lordship ordered that the VICE-CHANCELLOR'S order dated the 19th of March be discharged, except so far as the same discharged the order dated the 6th of January; and that it be referred to the Master to approve of a proper person or persons to be appointed the guardian or guardians of the infant: and the Master was to inquire and state to the Court the infant's

\*age, and what relations she had, and the nature and amount of her fortune, and also on what evidence or ground he should approve of any particular person or persons to be such guardian or guardians: And the Master was also to consider of a scheme for the residence of the infant, and what would be proper to be allowed for her maintenance and education, to commence from the 2nd of December, 1840, the time of her mother's death, and for the time to come during her minority; And to state out of what fund such allowance ought to be paid: And after the Master should have reported, such other order should be made as should be just.

JOHNSTONE  
v.  
BEATTIE.  
[ \*51 ]

This was the order now appealed from.

From the affidavits read before the Vice-Chancellor, on the hearing of the appellants' petition, and afterwards before the Lord Chancellor, on the appeal to him, and set forth in the printed cases, the following extracts are made of the material passages, which were frequently referred to in the arguments on this appeal, and by the Lords in their judgments.

The affidavit made by the appellants on that occasion stated—among other things which were also stated in their petition—that Mr. Beattie's deed of nomination of tutors and curators was, according to the law of Scotland, an instrument of a testamentary nature, and that by the law of Scotland a tutor appointed by a father was, after the death of the mother, vested with the management of the person of the infant; and that the same deed being a document of a testamentary nature, constituted a good appointment of deponents not only to be tutors according to the law of Scotland, but also to be guardians of the infant according to the law of England. And the deponents said that they were informed and they believed that Mrs. Beattie, by her will, bequeathed all the property she had to her father for his life, and after his death to be divided among her surviving brothers; and that she \*did not by her will bequeath any property whatever to her daughter, the infant plaintiff, and they did not believe that there was, as alleged in the bill, a considerable or any sum of money due to the infant from her mother's estate, and they verily believed that the infant had not any property whatever in England. And deponents said that they had for nearly five years duly managed the affairs of the infant in Scotland, and complied with the requisites of the law of Scotland in regard to giving up inventories of her property; and further, that they had held meetings yearly, at which they audited the

[ \*52 ]

JOHNSTONE  
 v.  
 BEATTIE.

accounts of the factor or receiver, and deposited the surplus rents in the Bank of Scotland, as directed by the deed of entail of the estate of Crieve, and they acted in all respects in accordance with the law of Scotland, and in conformity with the advice of Scotch counsel. And deponents said they were advised and believed it would be most inexpedient, and lead to a collision of laws and forms, if the Court of Chancery in England were to supersede the guardians appointed by the father of the infant according to the law of Scotland, and any expenditure for the maintenance of the infant would be liable to be overruled by the law of Scotland. And deponents said, that in the arrangements which were made by them, they considered solely what was most for the benefit of the infant; and it was their intention, unless superseded, to consider what would be most for the health and benefit of the infant in the management of her education, and the choice of her residence. And they said that they could take care of the infant in England, while it might be expedient for her to continue in that part of the United Kingdom; and that the most anxious solicitude and attention had, since the decease of her mother, been entertained for and bestowed upon the infant by these deponents, and also by Miss Graham Stewart, the sister of the deponents J. Hope Stewart and W. Stewart, who took charge of the infant by their direction.

The following is an extract from an affidavit made in support of the appellants' said petition, evidencing the law of Scotland on the subject:

[ \*53 ]

John Marshall, of Edinburgh, Esq., advocate, and James Newton, of the same city, Esq., writer to the signet, severally said, that they had severally been admitted as an advocate \*and as writer to the signet, and had respectively acted and practised as such in the Court of Session in Scotland, for upwards of 20 years; that they were well acquainted with the law of Scotland, as respected the nomination and duties of tutors or guardians according to that law. And these deponents said, that by the law of Scotland the nomination by a father of tutors to his infant child, invested the tutors named in his deed of appointment, and who accepted the office of tutors, with the guardianship of such infant until such infant attained the age of 12 years, if a female, and 14 if a male; and particularly that a deed of nomination by the father conferred upon such accepting tutors the right to the custody and charge of the person of the infant; and that this right of custody belongs to the tutors, to the exclusion of all other persons whatever, except in the

case where the tutor happens to be the person who would succeed as next heir of the infant, in the event of his or her death, and excepting also in the case where the infant's mother is alive: That the mother is entitled to the custody of an infant whose father is dead until the infant attains the age of seven years, provided the mother remains a widow, but no such right of custody belongs to her relations upon her decease; and that even in a case where the mother was alive and remained the father's widow, a tutor nominated by the father has been held to be entitled to change the residence of an infant under seven years of age for the sake of education, without the consent of the mother.

JOHNSTONE  
v.  
BEATTIE.

An affidavit made by Mr. Duncan Stewart, in opposition to the appellants' said petition, contained several letters from Mrs. Beattie to him, set forth for the purpose of showing that she abandoned her Scotch domicile, [but for the purpose of this decision the Scotch domicile of the infant was assumed to have remained unchanged, and it is unnecessary to refer to the evidence or arguments upon that point.]

*Mr. Turner and Mr. Romilly, for the appellants :*

[ 63 ]

By the principle of the order now appealed from, no distinction is made between English and foreign infants; Miss Beattie being a foreign child temporarily residing here, the Court of Chancery had no jurisdiction over her. \* \* \*

When guardians have been lawfully appointed by the father of a child, according to the law of the country in which both are domiciled, and where their property is situated, and with which alone they have any connexion, the quality of such guardianship, and its effect on the status of the child, must accompany that child everywhere, must be acknowledged and recognised in every other country as much as the guardianship of the parent; and if the child is casually \*in England by the act and consent of the guardians, the duty of the law of England is to look solely to these guardians, to acknowledge them as much as it must do the parent, and to protect their legal status as a part of the inherent status of the child, not to interfere with or supersede them. That doctrine has been recognised and acted upon in the cases of persons found lunatics in foreign countries, where guardians or committees had been appointed by a competent tribunal there: *Ex parte Otto Lewis* (1). It may be admitted that the Court of Chancery has a

[ 69 ]

[ \*70 ]

JOHNSTONE qualified jurisdiction to enforce the orders of foreign Courts, by the  
 & comity of nations, to be exercised as an auxiliary jurisdiction,  
 BEATTIE. at the instance and for the assistance of the parents or other  
 natural guardians of infants, but never as an engrossing juris-  
 diction, superseding the authority of parents or guardians duly  
 appointed. \* \* \*

[ 73 ]            The *Solicitor-General* and *Mr. Spencer Follett*, for the  
 respondent :

The order made by the LORD CHANCELLOR was not only right, but the only order that could be properly made. Here was a child of tender age brought to England, and residing there when her mother died ; she had no guardian in England ; a bill was filed for the purpose of obtaining for her the protection of a guardian, and an application was made to the Court for that purpose, whereupon the VICE-CHANCELLOR made an order appointing guardians. The appellants complained of that order ; a contest arose between the parties ; the VICE-CHANCELLOR reversed his first order, and made another more erroneous ; on appeal therefrom, the LORD CHANCELLOR, after the appellants declined his offer of appointing them jointly with Mr. D. Stewart and Mrs. Buchanan, directed the usual order of reference to the Master, leaving to him to select and approve of proper persons to be guardians. Was not that the usual course ? it was in accordance with the practice of the Court from the time of Lord HARDWICKE : *Ex parte Watkins* (1).

It is objected that the child in this case is domiciled in Scotland, and therefore the Court of Chancery had no jurisdiction. The short answer to that objection is, that it is wholly immaterial to the jurisdiction where her domicile is ; she is an infant now residing and intended to reside in England, and the Court of Chancery is bound to extend its protection to her, as it is to all infants who require it, having no parent or guardian residing within the jurisdiction. \* \* \*

[ 79 ]            *Mr. Turner*, in reply :

It is admitted that all infants without parents or guardians in England, are entitled to the protection of the laws of England : on the other hand, those laws recognise the laws of foreign countries, and give effect here to their orders. This infant does not want the protection offered ; she has guardians already

appointed for her protection, as willing to take care of her in England as in Scotland; and the chief objection to the course pursued by the LORD CHANCELLOR is, that while there is no imputation on those gentlemen, the Court of Chancery interferes to deprive them of their office.

JOHNSTONE

v.  
BEATTIE.

(LORD CAMPBELL: The argument was, that if a foreign child is in this country, the Court of Chancery has a right to interpose its jurisdiction, even though the child has guardians. It is clear there may be cases in which that interposition would be proper.)

It is admitted that such cases may arise. But if this is not a case calling for that extraordinary protection, is it proper to interfere? This child has her guardians selected by her father. \* \* \*

It is said in Mr. Burge's Commentaries on Colonial and Foreign Laws, in the passages before referred to (1), that personal laws are of universal extent and operation; that jurists concur in representing as personal laws, those which place minors under the authority of their guardians or tutors; that States, from comity and considerations of mutual interest, recognise and give effect to the laws of each other, where the rights either of their own subjects or of foreigners are derived from or are dependent on those laws; and that, from comity, foreign States recognise and give effect, almost universally, to those laws of the domicile which constitute the status, quality, or capacity of the person, and which are called personal. Vattel also says (2), "It is the province of a nation to exercise justice in all the places under her jurisdiction; that other nations ought to respect this right;" and that, "in consequence of this right of jurisdiction, the decisions made by the Judge of the place within the extent of his power ought to be respected, and to take effect even in foreign countries. For instance, it belongs to the domestic Judge to nominate tutors and guardians for minors and idiots. The law of nations, which has an eye to the common advantage and the good harmony of nations, requires therefore that such nomination of a tutor or guardian be valid and acknowledged in all countries where the pupil may have any concerns." \* \* \*

If the law of England by comity adopts the law of Scotland, there is no doubt that these Scotch tutors are guardians of this child in England, until she attains the age of twelve years. The Court ought to recognise, and, if necessary, confirm them in the office,

[ 81 ]

[ \*82 ]

(1) Vol. 1, c. 1, pp. 13, 14, 25.

(2) B. 2, c. 7, ss. 84, 85.

JOHNSTONE <sup>v.</sup> BEATTIE. having regard to the solemn deed of the father, in preference to the unascertained wishes of the mother; whose rights as a parent, be it observed, were merged in her duty as joint tutor, in which character she must, according to the law of Scotland, have submitted to the majority.

[Other authorities cited by counsel are referred to in Lord BROUGHAM's judgment, *post*, p. 43.]

[ 83 ] LORD BROUGHAM:

This being a case of first impression, and having excited great interest in Scotland very naturally, and in this country also, we must take time to consider it.

Lord CAMPBELL agreed that they ought to take time for consideration; although he had no doubt of the jurisdiction of the Court of Chancery.

The further consideration of the case was then adjourned.

May 16.

Their Lordships finding afterwards that they were equally divided in their opinions on the validity of the order appealed from, ordered the case to be again argued by one counsel on each side, in the presence of other Peers. Accordingly on the 16th of May, Lord LANGDALE and other Peers being present, *Mr. Turner* was heard to argue the case for the appellants, and the *Solicitor-General* for the respondent. The jurisdiction of the Court was, on this occasion, declared by the Lords to be undeniable, and was therefore admitted by *Mr. Turner*, who also admitted that the appellants were not testamentary guardians within the Act 12 Charles II. The argument was principally applied to the justice and expediency of admitting the tutors to act as guardians in England. \* \* \*

May 26.

THE LORD CHANCELLOR:

[ 84 ]

This appeal was argued at considerable length some time back, but as your Lordships did not agree in opinion as to the judgment proper to be pronounced, it was argued a second time a few days ago; and I am sorry to say that even now, as the result of the second argument, there is a difference of opinion among your Lordships. I entertain the utmost possible respect and deference for the opinions of those noble Lords who differ from the judgment which I have formed; but I think it my duty to move your Lordships that the order of the Court below be affirmed.

I will state to your Lordships very shortly the grounds upon which I think this order ought to be affirmed. A bill was filed in the name of an infant, Mary Stewart Beattie, by her next friend, her grandfather, against the appellants and other defendants. The bill alleged that the defendants were in possession of rents and profits, the produce of the estates of the infant, to a very large amount: it prayed that they might account, in the Court of Chancery, for the sums which they had so received: it prayed also that a maintenance might be appointed for the infant, and that the estates and her person might be placed under the protection of the Court. This was the scope and the object of the bill.

JOHNSTONE  
v.  
BEATTIE.

It is proper that I should state, that according to the uniform course of the Court of Chancery,—which I understand to be the law of that Court, which has always been the law of that Court,—upon the institution \*of a suit of this description, the plaintiff, the infant, became a ward of the Court,—became such ward by the very fact of the institution of the suit; and being a ward of the Court, it was the duty of the Court to provide for the care and protection of the infant; and as the Court cannot itself personally superintend the infant, it appoints a guardian, who is an officer of the Court, for the purpose of doing that on behalf of the Court, and as the representative of the Court, which the Court cannot do itself personally. If there be a parent living within the jurisdiction of the Court, or if there be a testamentary guardian within the jurisdiction of the Court, the Court in that case does not interfere for the purpose of appointing a person to discharge the duty, which is imposed upon the Court itself, of taking care of the person of the infant; but the parent or the testamentary guardian is subject to the orders and control of the Court, precisely in the same way as an officer appointed by the authority of the Court, for the purpose of discharging the duties to which I have referred. I apprehend that is clearly the law of the Court of Chancery; and it has always been so, as far as I have been able to understand and comprehend.

[ \*85 ]

The manner in which this appointment (of guardian) is made, is not without previous inquiry and consideration. The Court directs the Master to inquire who are the proper persons to be entrusted with the care of the infant; and as that custody and care may endure for some time, it is necessary that some inquiry should be made for the purpose of determining how that care should be



JOHNSTONE  
v.  
BEATTIE.

[ \*86 ]

exercised. That must depend, in some degree, upon the property which the infant possesses ; and therefore an inquiry is made as to the property of the infant, and as to what is proper to be \*allowed for maintenance, and also as to the manner in which the education of the infant shall be conducted. All these are preliminary inquiries as to matters of fact, for the information of the Court ; and when the Master has made his report, the report is taken into consideration by the Court, and the Court acts upon it according to its judgment: it does not necessarily adopt the suggestions of the Master, but it uses the materials which are found by him as the ground upon which the judgment proceeds.

Now the order which is here complained of, is merely an order of this description. The LORD CHANCELLOR has directed the Master to inquire who are proper persons to be appointed as guardians of the infant, or, in other words, to approve of persons to be guardians ; to inquire what will be a proper maintenance for the infant, what her property consists of, and what scheme of education should be adopted. I apprehend, therefore, that the order is according to the common rule of the Court, and I really do not precisely understand the grounds upon which it is objected to. I can state some of the objections which have been urged at the Bar, but which appear to me to be altogether invalid.

[ \*87 ]

One objection is this : that tutors and curators have been already appointed ; that the young lady being a Scotch child, tutors and curators have been appointed in Scotland by the will of the father. The father is dead, and the mother also is dead ; but the child is here in England. The tutors and curators are domiciled and living in Scotland ; they are out of the jurisdiction of the Court. The Court can exercise no control over them ; cannot make them amenable for any misconduct in the management of the infant ; and I apprehend that in all cases the Court \*requires that there shall be a guardian appointed within the jurisdiction of the Court, responsible to the Court, subject to its jurisdiction and its authority. If there be a parent, residing out of the jurisdiction, the Court interferes, and appoints a guardian within the jurisdiction : if there be a testamentary guardian, residing out of the jurisdiction, the Court appoints a guardian within the jurisdiction : because it must have some person to look to, some person who is the representative of the Court on the spot, responsible to the Court, who shall have the care and management of the infant.

The tutors and curators, domiciled in Scotland, have no authority

in this country; they cannot control the infant. If the infant chooses to take the protection of any other person, who may be an improper person, deluded, if you will, by that person, the tutors and curators have no power of themselves to interfere. But they have the power to interfere through the medium of the Court of Chancery. A guardian may be appointed by the authority of the Court of Chancery; and if a complaint is made to that Court by the tutors and the curators, the Court of Chancery will set it right through the medium of the officer whom the Court has appointed. If it is thought desirable that the child should go to Scotland to reside, the tutors and curators have no power to take the child to Scotland, unless the Court, having appointed a guardian, thinks fit for the benefit of the child to direct the guardian to hand the child over to the Scotch tutors and curators, in order that it may be carried to Scotland for the purpose of education, or for any other purpose.

JOHNSTONE  
v.  
BEATTIE.

It seems to have been assumed in the argument in this case, that because the guardians are appointed by \*the Court of Chancery, therefore the Court of Chancery has decided by this order that the child is to remain in England; that she is to be educated in England; that she is to have her maintenance given in England, and that she is to continue in England up to the time of her attaining the age of 21. But no such consequence follows. The Court of Chancery may, at any time that it thinks proper, direct the infant to be taken to Scotland, to be educated there, if it considers that it will be for the benefit of the infant. The order does not go to the extent of saying that there is to be no change in the residence of the child: it is subject entirely to the control, to the order, and to the discretion of the LORD CHANCELLOR for the time being.

[ \*88 ]

It is supposed also that the tutors and curators appointed in Scotland are not to be the guardians of the child, or not to be among the guardians of the child. All that the Court requires is this: that there shall be some person within the jurisdiction, and responsible to the Court, performing the duties of guardian. There is nothing in this order inconsistent with the LORD CHANCELLOR ultimately appointing the tutors and curators who reside in Scotland, as guardians, with any other persons who are residing and domiciled in this country, and subject to the jurisdiction of the Court. It does not appear to me, therefore, that any of those objections which have been successively urged at the Bar are valid

JOHNSTONE objections to this order. It appears to me to be an order in the  
 BEATTIE, common course.

[ \*89 ]

But it is said that if this order is to prevail, it will follow that any child of Scotch or other foreign parents, brought to England for the purpose of education, may be made a ward of Chancery, and impounded \*at once in this country. Undoubtedly there may be cases of that description. One may suppose circumstances of such a nature as to render the interference of the Court of Chancery not only proper but absolutely necessary. Cases may be supposed where the Court of Chancery under such circumstances ought to interfere. But then it is said that fictitious cases may be set up, and that a bill may be filed expressly for that purpose by some concert or contrivance. My Lords, the authority of the Court may, of course, be subject to be abused in this, as in every other instance; but the Court will vindicate its authority, and will not suffer it to be abused: and I know no case in which it has ever been suggested that in this direction any abuse has been committed of the authority of the Court of Chancery. Suppose a bill obviously fictitious for the purpose I have stated were to be filed, the Court would afford an instant remedy. The bill might be referred to the Master, for the purpose of determining whether it was for the interest and benefit of the infant that the suit should be prosecuted; and if the Master should report in the negative, there would be an end of the suit, and the costs would fall upon the party who had so improperly instituted the suit; and as a suit can only be instituted through the medium of a solicitor, the Court would visit the solicitor in a further and much more exemplary manner. It does not appear to me, therefore, that the objection that the authority may be abused, is any valid objection in a case of this description.

[ \*90 ]

It is further suggested that this bill is filed solely for the purpose of making this infant a ward of the Court of Chancery. It may be so. It often happens that bills are filed solely for such purposes; and it may be a very important object, in which the \*interest of the infant is deeply concerned. Whether this bill is of that description or not, is wholly immaterial. The bill states facts, which bring the case within the jurisdiction of the Court. It states that there are large sums in the hands of the defendants; it prays for an account; it prays that the money may be paid into Court; it prays also for the allowance of a maintenance; it prays that the child's property may be put under the jurisdiction of the Court.

JOHNSTONE  
v.  
BEATTIE.

The defendants, who are in Scotland, have appeared to this bill; but they have not put in their answers, and the cause is not at issue. We cannot decide the merits of the cause, in this stage of it, upon a motion of this description. Such a course of proceeding was never heard of in the Court of Chancery. The cause is depending; the defendants must put in their answers; issue must be joined; all the evidence must be heard, and the cause must be decided as every other cause must be decided. We cannot anticipate the result; but till the result takes place, the child is a ward of the Court of Chancery. No person can interfere where a child is a ward of the Court of Chancery, without calling down upon himself the process of that Court. The appointment of guardians in this respect makes no difference. Whether there be guardians or not, the child is under the immediate control and in the custody of the Court of Chancery. The appointment of guardians in this respect makes no difference. The guardian is only appointed as an officer of the Court, as the mode by which the jurisdiction and authority of the Court is to be exercised. It may happen, indeed, in the result that this bill should be dismissed. It may happen that the plaintiff, the next friend, may have to pay all the costs. It may happen that in the result the Court \*may direct this infant to be handed over to the tutors and curators in Scotland; but we cannot anticipate what will be the result until the cause comes to an issue; until the witnesses are examined, and until the cause is decided. Until that takes place, as I said before, the child is absolutely a ward of Court, and cannot be taken out of the jurisdiction of the Court, whether guardians be appointed or not. The appointment of a guardian makes no difference, except as the medium through which the jurisdiction of the Court is exercised; because the Court thinks it better that there should be prevention against violence and misconduct, than that it should be afterwards called upon to investigate a charge of violence and misconduct, for the purpose of affording a remedy.

[ \*91 ]

For these reasons, I think this order ought to be sustained. I confess that in the course of the argument I found it very difficult to understand what ground there was for objecting to it, consistently with the course of practice and the uniform authority of the Court of Chancery, with respect to cases of this sort. I must, therefore, under these circumstances humbly move your Lordships that this order be affirmed.

JOHNSTONE LORD BROUGHAM :

BEATTIE.

The facts of this case are few and simple, and I need not recite them. It is my misfortune to have formed a different opinion from that of my noble and learned friend ; and I must now state to your Lordships the grounds of the judgment which I am compelled to give in opposition to his.

[ \*92 ]

The appointment of guardians to infants, who are unprotected, appears to arise in all countries from the necessity of the case ; and it would be difficult to \*point out any other particular in which the jurisprudence of all countries agrees more generally than in the existence of such a power, usually confided by the Sovereign to the Courts of the realm. The nature of the appointment seems personal, as the object of it is the infant individual's personal protection. But there is incident to the office also the care of the infant's property ; and in some systems of law, as that of Rome and of the countries which adopted the civil law, a distinction is made between the care of the property and that of the person ; curators being given to the former, tutors to the latter.

It is very material to the present question that we should mark the provisions of the Scotch law on this head ; Scotland being beyond all reasonable doubt the domicile of the infant in this case, as it is admitted to have been the place of her birth, and the place where all her property real and personal is situated. By the law of Scotland the father may appoint a guardian to act after his decease. In default of such appointment or of the appointed guardian's accepting the office, the right of the guardianship by law devolves on the next of kin, called the nearest agnate : a year, *annus deliberandi*, is given this relation to determine whether or not he will accept the office called that of tutor legitim, or of law. In case he declines, a guardian is named by the Court of Session (1), called a tutor dative. But so much is the will of the parent and the legal right of the agnate regarded, that if either the tutor testamentary or the tutor of law at any time shall elect to act, the powers and appointment of the tutor dative at once cease.

[ 93 ]

The necessity of extraordinary protection to unprotected infants leaves no doubt of the power in the Sovereign, or those to whom he has delegated it, to appoint a guardian, whensoever an infant comes before him or them, and requires protection. The jurisdiction of

(1) Sitting as the Court of Ex- c. 54, transferred to a Judge of the chequer, the duties and powers of Court of Session. which were by the Act 2 Will. IV.

the Court of Chancery in the present case flows from that source, and is indisputable. And I must be allowed to observe, in passing, that much of the argument and reasons of the authorities urged for the respondent have been pointed to combat a position which is not at all a necessary part of the appellants' case; namely, the supposed denial of the Court's jurisdiction. That jurisdiction I hold to be indisputable. But it does not follow that in every case the jurisdiction must be exercised; that the Court is bound, as a matter of course, always to interfere; that the nomination of a guardian is of such necessity as to follow immediately from the fact of infancy coming to the Court's knowledge, in the same manner in which the dismissal of a suit for want of prosecution, or signing a decree by consent of all parties on matters that leave no option to the Court. The Court always and in every case has the jurisdiction, but it is not always and in every case a matter of course that it should be exercised: on the contrary, though the right is absolute, its exercise is discretionary; so that in many cases the exercise of it, I hold, would be a plain miscarriage of the Court, and one that would require correction by the Court of appellate jurisdiction. Thus the Court of Chancery has interfered in preventing the father himself from exercising the *patria potestas* over the child, when the situation and the interests of the child were competently brought before it (1). But though the right of interference \*was generally vested in the Court, the circumstances authorising its exercise were matter of discretion in it, and of review by the appellate tribunal. So it may always be a question whether the understood right to appoint a guardian has been wisely and discreetly exercised; and if the Court of Appeal finds that it has not, there is ground for a reversal of the order.

JOHNSTONE  
v.  
BEATTIE.

[ \*94 ]

The first question that arises in considering this matter is the degree in which the protection is wanted and the infant left unprotected, because this may be said to be the ground of the jurisdiction; but most emphatically it is the thing that calls for, and thus justifies the exercise of it. Now, as there are guardians in this case, appointed by the *lex domicilii*, this leads me to consider what are the powers of a guardian beyond the territory in which he is appointed and to which the infant belongs.

Most of the authorities in the general law of Europe seem agreed that the guardian validly appointed in any given country has an authority for the protection of the ward and the administration of

(1) *Wellesley v. Wellesley*, 31 B. R. 15; 2 Bligh (N. S.) 124.

JOHNSTONE  
 v.  
 BEATTIE.

his personal estate everywhere, *ex comitate*: and the manifest convenience of this *comitas*, as well as the evident consideration that the appointment is eminently of a personal nature, appears to justify this position. The guardian is a substitute for the parent; and the artificial relation resembling the natural, from which it flows, ought surely to follow the same analogies, and to extend everywhere with the person. Nor would it be easy to assign any reason why the Court of a foreign country, in which the ward might chance to be temporarily resident, should refuse to \*recognise the tutorial relation, and the powers which it bestows, less than the parental relation and the *patria potestas* belonging to it. If there were, from the nature of the thing, any local peculiarities in the law or the jurisdiction appointing guardians; if that relation was constituted by virtue of any peculiar local policy varying in different countries, there might be some reason for holding that the Courts of our country should not regard the appointment made of guardians in the other. If, for example, in the feudal times, any right of a territorial description belonged to the lord over the infant orphan of his vassal, it would be much less clear that a foreign country should respect the claims of such lord when asserted beyond the limits of the lord's and vassal's country. But where the choice is made either by the natural parent in exercise of his parental power—a power common to all nations, or by the substitution of the next of kin in default of such appointment, or by the authority of the supreme Court to which the parent and infant alike owe allegiance, and which has the sole disposal of the infant's property, then surely nothing can be alleged to show that this choice should not be respected everywhere and in every country in which the infant may accidentally be found for a temporary residence.

There is no difference between the systems of the two countries, no peculiarity in that of Scotland, except that which makes the application of an English jurisdiction much more intolerable; because the law of the infant's domicile gives, as I have shown, a great preference to the guardians of blood and kindred, and confines the authority of the Court within very narrow limits. The only exception to the natural authority, which rests upon principle, is that of the \*real estate. It seems reasonable enough that the power of the foreign-appointed guardian should be confined to the personalty of the infant, in order to exclude his interference with the immoveable property, which is more peculiarly subject to the

[ \*95 ]

[ \*96 ]

*lex loci* than the moveable, which has no *situs*, but follows the person of the owner.

JOHNSTONE  
r.  
BEATTIE.

The authority of all, or nearly all, jurists follows these principles. Vattel (1) lays it down generally that the guardian appointed by the Judge of the domicile, is guardian wherever the pupil may have any concerns. Hertius says (2), "*Tutor datus in loco domicilii etiam bona alibi sita administrat*;" but he confines this to personalty. It is to be observed that his *dictum* excludes all necessity of confirmation or new appointment by the foreign Courts, wherein the guardian is to sue or be sued. Matthæus (3) confines the power also to personalty; though others, as Stockmans (4), make it general. Boullenois (5) is equally strong to this effect; and Merlin (6) expressly says, a guardian sues for debts due to his ward abroad, without any confirmation whatever of his title. Even those who have been cited on the other side, as P. Voet and J. Voet, are, in so far as personal property is concerned, only apparently at variance with the authorities, because they hold all such property to belong to the country of the infant's domicile, and that its disposal is governed by the laws of that domicile. And one thing at least is clear, that none of those jurists—not even Dr. Story, who quotes the American laws as not recognising the authority, in one State, of the guardians named in another—have ever thought \*of contending that the foreign guardian cannot exercise the personal superintendence of his ward; still less, if less be possible, do they ever contemplate the possibility of any Court appointing guardians for a foreign infant. We may add the authority of what was held in the case of a bankrupt's assignees, in *Hunter v. Potts* (7), by the Court of King's Bench, and in *Morrison's* case by this House (in February, 1749), in the instance of a lunatic's committee, as cited in *Sill v. Worswick* (8); in both of which cases the legally appointed curator in one country was held entitled to act in another.

[ \*97 ]

Now can it be doubted that these principles, although not sufficient to exclude the jurisdiction of the Court in any given country, would be abundantly sufficient to restrain its exercise; in other words, that they would prescribe to the Court, in which the infant's protection either as to person or property came in question, the sound sense of limiting its inquiry in the first instance to the

(1) B. 2, c. 7, s. 85.

(6) Repertoire, p. 412.

(2) 1 Opera de Colli. Leg. s. 4, n. 8.

(7) 2 R. R. 353 (4 T. R. 182).

(3) De Auctionibus, L. 1, c. 7, n. 10.

(8) 2 R. R. 816 (1 H. Bl. 665; see p. 677).

(4) Decis. 125, n. 6.

(5) Obs. 4, p. 51.



JOHNSTONE  
v.  
BEATTIE.

question whether the infant was unprotected or had a guardian already appointed validly by the Court, or according to the law of the country to which she belonged and in which her property was situated? If it were found, in the result of this inquiry, that the infant had such guardians, would it not follow that to them the Court should leave the matter, or, at the most, should only appoint them or rather confirm their appointment, in order to remove every shadow of doubt respecting their title to act? Though even to that interposition there would be a serious objection, as we shall presently see. Such I humbly conceive to be the course which the Court of Chancery in the present instance ought \*to have taken; and not having taken it, I hold that there has been a miscarriage, which this Court is required to correct.

[ \*98 ]

[After pointing out some inconvenient consequences which might follow upon an improper interference of the Court of Chancery with a Scotch guardianship, his Lordship said:]

[ 103 ]

I am therefore of opinion that there has been a miscarriage in this case; that this House is called upon to reverse the erroneous order. That the Great Seal had a right to interfere, had a jurisdiction over the question, and that it was called upon to exercise that jurisdiction and to entertain the question up to a certain point, is quite manifest; because an allegation, whether by bill or by petition, that the infant, being within the jurisdiction was not protected, there was a necessity for entertaining the complaint, so far at least as to inquire into the state of the facts, and ascertain whether or not the law and the Courts of the infant's domicile had not sufficiently provided for the guardianship. So in a suit for the

[ \*104 ]

restitution of \*conjugal rights or jactitation of marriage, and nullity of marriage, our Courts Christian will entertain the question and inquire into the validity of the alleged marriage, although it is averred in the libel to have been so solemnized in a foreign country. But having opened the door to the inquiry how far by the law of that country the marriage was valid, the English law, to use Sir WILLIAM SCOTT's happy expression in a celebrated case (1), withdraws and leaves the Scotch law to decide the point. So here the Court of Chancery must needs ascertain that guardians have been appointed and duly appointed in the country of the infant's domicile; and having so found, the Great Seal ought, in my humble judgment, to withdraw and leave the guardian of the domicile in possession of the ward.

(1) *Dalrymple v. Dalrymple*, 2 Hag. Cons. Rep. 59.

If it be said that the Scotch guardian is out of the jurisdiction, and that mischief might have arisen to the ward without a remedy, or that the good intentions of the Court might be defeated by leaving the custody to persons over whom it has no control,—the answer is obvious, and it is satisfactory. The property, at all events, must be left so unprotected in every respect; over that the Court can have no control. But the Scotch guardians, who have the care of it, may also extend their care to the person though in England; nor will they be unaccountable in performing that office. They are accountable to the Scotch Court, and they will be compelled by that Court to do their duty, and visited with punishment for neglecting it, as well touching the person as touching the property. We are not dealing with the natives of some barbarous country, which has no \*regular tribunals and no system of jurisprudence; we have to do with the law and the customs and the Courts of a people as civilized as ourselves, and we may safely leave it to the Judges who sit in authority over that people to see that the Scotch guardians do their duty. There is no complaint competent here, no application for superintendence and control, no petition for redress respecting the personal management of the infant, which may not be urged with entire hope of full success in the Courts of Scotland; and the same law and the same judicature to which we must of absolute necessity leave the whole care of the property, may well be left to take care also of the person, and to dispose of all the questions that may arise in connexion with that care.

JOHNSTONE  
v.  
BEATTIE.

[ \*105 ]

These arguments I submit respectfully but confidently to your Lordships; I submit them to my noble and learned friend, whose candour I well know is equal and in proportion to his sagacity; and I feel assured that if they should have the effect of raising any doubt in his mind, the party and the law will have the benefit of that doubt. And on the other hand, I am sure that I should at once have retracted the opinion which I had formed, in case what I have heard had impressed a doubt upon my mind.

LORD COTTENHAM :

It has been my fate, in the Court of Chancery and in this House, to hear this case three times argued; and I now have the additional advantage of hearing what has fallen from my noble and learned friend, who has just addressed the House; and but for the difference of opinion which I was aware existed upon this subject

JOHNSTONE  
 &  
 BEATTIE.  
 [ \*106 ]

among the members of your Lordships' House, I certainly should have \*thought it a case which was purely of course, and this an order which is consistent with every day's practice in the Court of Chancery, and to the pronouncing of which I never in my experience have known any exception. But knowing that this did not strike other noble and learned Lords in the same light, I have thought it my duty very carefully to review the whole of these proceedings from the commencement, and to see whether there is anything in what has been stated which should induce me to alter the opinion I formed in the first instance.

Before I proceed to state to your Lordships the result of this investigation, there is one point, which seems to have struck my noble and learned friend very forcibly, on which I would wish to make one or two observations; namely, the supposed sort of imprisonment within the large limits of this country, which he seems to have imagined is imposed upon an infant, who has the misfortune, as he would represent, of having guardians appointed by the Court of Chancery in this country. My Lords, there is no such imprisonment; there is no other restraint than the necessity of asking the leave of the Court, before the infant is taken out of the limits of the jurisdiction. If there is any such restraint, any such imprisonment, I certainly never heard of it during the administration of my duties when I had the honour of holding the Great Seal. When an application of that sort was made to me, the only subject upon which, as it occurred to me, I ought to form an opinion, was whether, under all the circumstances, it was for the interest and benefit of the child that the application should be granted. The misfortune therefore supposed to be inflicted upon the child is, that the mind of the LORD CHANCELLOR for \*the time being should be exercised upon the question, whether it is for the interest of the child or not that it should be allowed.

[ \*107 ]

A case very similar to the present occurred while I was Chancellor. A Scotch child was brought into this country, and the same contest arose. An application was made to appoint a guardian. The Scotch tutor or curator resisted that, and upon the same ground upon which it has been resisted in this case; viz. that the Scotch tutor and curator had authority over the child in England, in opposition to the power of the Great Seal, and to the exclusion of any person to whom the Court of Chancery might think fit to entrust the duty of superintending and taking care of the child.

I certainly was not much impressed with the argument; it was very shortly urged, and I believe not very strongly felt by those who urged it. Upon that occasion I formed the same opinion which I did in the present case, that the Scotch tutor and curator had no authority or power whatever in this country, and that the child was therefore entirely without protection here; and that it was a case, therefore, in which it was the bounden duty of the Court of Chancery to appoint an officer of its own to take care of the child. It afterwards occurred that it would be beneficial to the child to go back to the country to which she belonged. An application was made to me: I investigated the whole of the case; I found that the child's friends all resided in Scotland; that she had no connexions in England; that there were means furnished for an excellent education for the child in Scotland; and therefore, without doubt or difficulty, I allowed the child to be taken back to Scotland, where \*I believe she has been ever since. This only shows that the hardship which is supposed to exist by the Court of Chancery taking, as it were, possession of these infants, and depriving them of all the advantages of being brought up amongst their own relations in their own country, has no place whatever, if, under all the circumstances, it appears to be for the interest of the child, that the child should be permitted to go back to its own country.

JOHNSTONE  
v.  
BEATTIE.

[ \*108 ]

[His Lordship here stated the proceedings in the cause out of which this appeal arose in order to show that the point now raised had not been raised in the Court below, and that it could not now be raised consistently with the order of the 19th March, 1841, by which the appellants had been appointed guardians. Upon this point he said:]

The appellants, who obtained that order of the 19th of March, 1841, and never sought to have it varied, cannot now complain of it, or ask the House to vary it. It appointed them guardians, and they were contented to accept the appointment from the Court; and yet they now ask the House to declare—the order standing unappealed from by them—that they are entitled to exercise all the authority of guardians, without and independently of the authority of the Court.

[ 117 ]

It has been said that if the Court had jurisdiction, it ought not in this case, in its discretion, to have exercised it. This is not very intelligible to those who are accustomed to the proceedings in Chancery. \*It means, I presume, that the Court ought not to have interfered: but when the order appealed from was made, the

[ \*118 ]

JOHNSTONE  
c.  
BEATTIE.

objections to this order. It appears to me to be an order in the common course.

[ \*89 ]

But it is said that if this order is to prevail, it will follow that any child of Scotch or other foreign parents, brought to England for the purpose of education, may be made a ward of Chancery, and impounded \*at once in this country. Undoubtedly there may be cases of that description. One may suppose circumstances of such a nature as to render the interference of the Court of Chancery not only proper but absolutely necessary. Cases may be supposed where the Court of Chancery under such circumstances ought to interfere. But then it is said that fictitious cases may be set up, and that a bill may be filed expressly for that purpose by some concert or contrivance. My Lords, the authority of the Court may, of course, be subject to be abused in this, as in every other instance; but the Court will vindicate its authority, and will not suffer it to be abused: and I know no case in which it has ever been suggested that in this direction any abuse has been committed of the authority of the Court of Chancery. Suppose a bill obviously fictitious for the purpose I have stated were to be filed, the Court would afford an instant remedy. The bill might be referred to the Master, for the purpose of determining whether it was for the interest and benefit of the infant that the suit should be prosecuted; and if the Master should report in the negative, there would be an end of the suit, and the costs would fall upon the party who had so improperly instituted the suit; and as a suit can only be instituted through the medium of a solicitor, the Court would visit the solicitor in a further and much more exemplary manner. It does not appear to me, therefore, that the objection that the authority may be abused, is any valid objection in a case of this description.

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It is further suggested that this bill is filed solely for the purpose of making this infant a ward of the Court of Chancery. It may be so. It often happens that bills are filed solely for such purposes; and it may be a very important object, in which the \*interest of the infant is deeply concerned. Whether this bill is of that description or not, is wholly immaterial. The bill states facts, which bring the case within the jurisdiction of the Court. It states that there are large sums in the hands of the defendants; it prays for an account; it prays that the money may be paid into Court; it prays also for the allowance of a maintenance; it prays that the child's property may be put under the jurisdiction of the Court.

JOHNSTONE  
v.  
BEATTIE.

The defendants, who are in Scotland, have appeared to this bill; but they have not put in their answers, and the cause is not at issue. We cannot decide the merits of the cause, in this stage of it, upon a motion of this description. Such a course of proceeding was never heard of in the Court of Chancery. The cause is depending; the defendants must put in their answers; issue must be joined; all the evidence must be heard, and the cause must be decided as every other cause must be decided. We cannot anticipate the result; but till the result takes place, the child is a ward of the Court of Chancery. No person can interfere where a child is a ward of the Court of Chancery, without calling down upon himself the process of that Court. The appointment of guardians in this respect makes no difference. Whether there be guardians or not, the child is under the immediate control and in the custody of the Court of Chancery. The appointment of guardians in this respect makes no difference. The guardian is only appointed as an officer of the Court, as the mode by which the jurisdiction and authority of the Court is to be exercised. It may happen, indeed, in the result that this bill should be dismissed. It may happen that the plaintiff, the next friend, may have to pay all the costs. It may happen that in the result the Court \*may direct this infant to be handed over to the tutors and curators in Scotland; but we cannot anticipate what will be the result until the cause comes to an issue; until the witnesses are examined, and until the cause is decided. Until that takes place, as I said before, the child is absolutely a ward of Court, and cannot be taken out of the jurisdiction of the Court, whether guardians be appointed or not. The appointment of a guardian makes no difference, except as the medium through which the jurisdiction of the Court is exercised; because the Court thinks it better that there should be prevention against violence and misconduct, than that it should be afterwards called upon to investigate a charge of violence and misconduct, for the purpose of affording a remedy.

[ \*91 ]

For these reasons, I think this order ought to be sustained. I confess that in the course of the argument I found it very difficult to understand what ground there was for objecting to it, consistently with the course of practice and the uniform authority of the Court of Chancery, with respect to cases of this sort. I must, therefore, under these circumstances humbly move your Lordships that this order be affirmed.

JOHNSTONE  
v.  
BEATTIE.  
[ \*121 ]

friend who last addressed your Lordships, I can see no difficulty whatever in a Court of Appeal admitting \*that the Court below has jurisdiction to interfere and to appoint guardians, and yet going on to inquire whether there was a due occasion for the interference of the Court, and whether its jurisdiction has been properly exercised. The Court of Chancery having a clear jurisdiction to grant an injunction or to appoint a receiver; upon an appeal from that Court we might surely inquire whether a proper case has been made out for granting an injunction, or appointing a receiver; and if we thought there was not, without questioning the jurisdiction of the Court, we should be bound to reverse the order which the Court had improperly made.

[ \*122 ]

Let us inquire whether in this case the Court was called upon to interfere and to appoint guardians. To justify the appointment of guardians, it cannot be enough to show that there is an infant having a temporary residence in England, placed here by the authority and under the superintendence of its father resident abroad, and judiciously and tenderly cared for by persons appointed by him for that purpose, the person of the infant requiring no care from the Court of Chancery, and the infant having no property in this country. If the father of such an infant be alive, the Court would not appoint guardians to it. Can it make any difference whether the child is so resident in England by the authority and under the superintendence of its father, or of tutors or guardians appointed by the deceased father, and confirmed by the legal tribunals of the country in which he was domiciled at the time of his death, and in which all the property of the infant is situated? Is it possible to lay down this proposition, that the Court of Chancery, whenever applied to, is bound to appoint guardians to an infant resident in England for a temporary purpose, \*if its father be dead? The mere death of a father of an infant domiciled abroad, and resident here for health or education or amusement, with the consent of those in whom the parental power is vested by the law of the country of its domicile, cannot necessarily require the expensive and useless and inconvenient process of the appointment of guardians by the LORD CHANCELLOR. It would be ridiculous to suppose that such an appointment must invariably and inflexibly be made, without considering whether the personal safety or personal interests of the infant require the interference of the Court; although the infant has no property to be protected; and although the appointment would manifestly be injurious to the

infant itself, as well as perplexing, annoying, and detrimental to its foreign guardians. The benefit of the infant, which is the foundation of the jurisdiction, must be the test of its right exercise.

JOHNSTONE  
v.  
BEATTIE.

Next let us attend to the facts of this case, which were regularly before the Lord Chancellor when the order appealed against was made. [His Lordship having then stated the facts and the proceedings in the Court below, continued as follows:]

If this order is to stand, guardians must be appointed as officers of the Court of Chancery; and when appointed they would have all the rights and powers of guardians, and would be entitled, under the superintendence of the Court, to the care of the infant and the management of all her property, until she attained the age of 21. The guardians so to be appointed are not in the nature of guardians *ad litem*, to attend to the suit or the interests which it involves; but general guardians, for the care and management of the person and property of the infant during minority. Now I am humbly of opinion that this order, so absolutely requiring the appointment of guardians to this infant, as officers of the Court of Chancery, superseding, as far as that Court can, the functions of the tutors appointed by her father and confirmed by the Court of Session, and directing that the infant and all her property shall be under the care and management of the Court of Chancery during her minority, ought not to be supported; that the utmost that could properly have been asked would have been to direct inquiry whether it would be for the benefit of the infant that any English guardian should be appointed, \*but that there was no case made even for directing such an inquiry; and that, both orders of the Vice-Chancellor having been reversed, the petition ought to have been dismissed. My noble and learned friend is reported to have said, "With respect to the first application to the Vice-Chancellor, I think it was a very improper one, because there seems to have been nothing whatever in the situation of the infant to justify such an application" (1). I most heartily concur in that observation. There appears to me to have been nothing in the situation of the infant which required the appointment of guardians by the Court of Chancery on the 6th of January, 1841; and I think there was as little on the 17th of April, 1841, the date of the order now appealed against.

[ 125 ]

[ \*126 ]

When the case was argued before Lord Cottenham, it would appear that the only points discussed at the Bar were the regularity

(1) 1 Phillips, 31.



JOHNSTONE  
v.  
BEATTIE.

of the second order of the VICE-CHANCELLOR, without a previous inquiry by the Master whether the tutors were to be considered testamentary guardians under the Act of 12 Chas. II. c. 24; and whether, the Court exercising the power of appointment, the tutors named by the father were not entitled to be preferred. I cannot help thinking that, if the counsel for the tutors, instead of relying on their preferable right, and trying in vain to support their appointment as English guardians without any reference to the Master, had insisted that no case was made out for the interference of the Court, and that the appointment of guardians would be prejudicial to the infant, the petition would then have been dismissed. The second order of the VICE-CHANCELLOR could not stand; for it is a well-settled and a very reasonable rule of practice, that before the appointment \*of guardians, there must be a reference to the Master to inquire who are fittest to be appointed. That order being set aside, and there being no sufficient ground for contending that the tutors were to be treated as testamentary guardians, Lord COTTENHAM properly disposed of the questions argued before him. But I humbly apprehend that, instead of proceeding to make an order by which guardians were to be appointed, and the person and property of the young lady were to be under the care and management of the Court of Chancery till she reached 21, and by which she was not to be allowed to marry or to go out of the jurisdiction of the Court without the leave of the LORD CHANCELLOR, he ought to have said that, under the circumstances, neither the care of her person nor the management of her property required his interference, and therefore that the petition for the appointment of guardians should be dismissed. He surely must have had the power to do so, although there was no appeal by the tutors against the second order, and they were willing to acquiesce in it. When it was set aside at the instance of the other party, the LORD CHANCELLOR had a right to consider what was the fit order to be substituted for it, and to look to the petition presented by the tutors, in which they submitted that there was no occasion for the appointment of guardians; and the petition for the appointment of guardians ought then to have been dismissed, if it ought to have been dismissed by the VICE-CHANCELLOR.

[After referring to the arguments of counsel, his Lordship continued:]

[ 130 ]

If the care of the person of the infant required the appointment of guardians, the Court might undoubtedly interpose for that

purpose, irrespective of any considerations of property; and it is said that she is to be taken as wholly unprotected, because according to the authorities the tutors appointed by the law of Scotland can in no degree and for no purpose be \*recognised in England. I must first observe that this would be a very inconvenient doctrine, and would lead to the general necessity of appointing guardians for all foreign infants found in England who have lost their fathers. I suppose it is admitted that the existence and power of the father, although he be resident abroad, would be recognised by the Court of Chancery; although it is said that the existence and authority of tutors or guardians appointed by the law of the country in which the child is domiciled, would not be so recognised. But after a diligent attention to all the cases cited, and all the writers referred to on this subject, I can find no authority for this distinction. The foreign jurists are very much divided as to the extent to which a guardian to an infant appointed in one country shall be recognised in another. Boullenois (1), Merlin (2), Vattel (3), Huberus (4), and Hertius (5), all expressly lay down that the guardian duly appointed by the law of the country where the infant is domiciled, is in every other country to have the same powers, and is entitled to assert any claims over the moveable property of his ward; and to sue for debts due to his ward in foreign countries, without having any confirmation of the guardianship by the local authorities, although the power over immoveable property belonging to the ward must entirely depend on the *lex loci rei site*. On the other hand, Paul Voet (6) and other jurists deny that the appointment of guardians has an extra-territorial authority, so as to entitle the foreign guardian *virtute officii* to exercise \*any rights, powers, or functions over the property of his ward, situated in a different State from that in which he was appointed guardian; and such appears from Dr. Story (7) to be the law in the different States forming the American Union. But in none of these writers is there the least intimation of opinion that the foreign guardian, whether he may assert a right of property and sue in his own name or not, will not be recognised so far as the care of the person of the infant is concerned, or that foreign tribunals will appoint new guardians

JOHNSTONE  
v.  
BEATTIE.

[ \*131 ]

[ \*132 ]

(1) Obs. 4. p. 51.

s. 2.

(2) Rep. Absens. c. 3, art. 3, s. 2,

(5) Opera de Colli. Leg. s. 4.

n. 2.

(6) De Stat. s. 4, c. 2.

(3) B. 2, c. 7, s. 85.

(7) Confl. of Laws, c. 13, s. 504 a.

(4) De Conflictu Legum, B. 1, c. 3,

JOHNSTONE  
 v.  
 BEATTIE.

superseding those appointed by the law of the country where the infant is domiciled, because the infant happens for a temporary purpose to be within the territory over which those tribunals exercise jurisdiction; and I cannot help thinking that Professor Story, whose authority has been relied upon by the respondents, would be very much startled at the idea of the Court at New York appointing guardians to an infant domiciled in Kentucky, and having no property out of that State, because the infant had been sent to school at New York by guardians regularly appointed by the proper Court in Kentucky. Indeed I know that the present analogous appointment has created great astonishment among jurists out of England, and is not considered in harmony with the enlightened principles on which the law is generally administered in this country.

[After referring to some cases which had been cited, but which did not in his opinion throw much light on the subject, his Lordship concluded his judgment by expressing a strong opinion that the petition for the appointment of guardians ought to be dismissed by the House.]

[ 145 ] LORD LANGDALE :

Amidst the differences of opinion which exist in this case, it is satisfactory to me that no doubt is thrown upon the jurisdiction of the Court of Chancery to appoint guardians for any infant residing in England. The whole property of an infant may be situate in a foreign country, and tutors and curators of the person and estate of the infant may have been duly appointed according to the law of the country where the property is; and yet it may be evident that, without the authority of a guardian duly appointed here, and subject to the control of the Court of Chancery, the infant may be without the protection which may be absolutely necessary for its welfare, and even for its safety. \*The jurisdiction being indisputable, the exercise of it in particular cases becomes a matter of discretion and expediency, depending on the peculiar circumstances of each case; and it is alleged that in this case the Court of Chancery ought either to have appointed the Scotch tutors and curators to be guardians, as was done by the second order of the VICE-CHANCELLOR, or ought otherwise to have refused to interfere at all, because no misconduct was imputed to the tutors and curators.

[ \*146 ]

The case, as far as it is known,—and I beg emphatically to say,

as far as it is known, for the case is still subject to inquiry and investigation, and is of course but imperfectly known, appearing only on the affidavits of the parties, the effect of which may be materially altered,—but the case, so far as it now appears, is of the most simple description. An infant, whose whole property is alleged to be in Scotland, and whose tutors and curators are usually resident in Scotland, is now resident in England and entitled to the protection of the English laws. Her grandfather, also resident in England, assuming, as he has a perfect right to do, to be the next friend of his grandchild, files a bill in her name in the Court of Chancery, praying, amongst other things, that her fortune and person may be protected by the Court, and that proper directions may be given for her maintenance and education. It may have been right or wrong to institute this suit. The usual and proper mode of trying that question is to apply to the Court of Chancery, on behalf of the infant, to have it inquired into and ascertained whether the suit is beneficial or prejudicial to the interests of the infant. If upon inquiry it appears to be contrary to the interests of the infant that the suit should be prosecuted, the \*Court stays the further prosecution of it, and charges the costs upon those by whom the suit has been improperly commenced; but in this case there has been no application made for any such inquiry, and upon the bill being filed the infant became a ward of the Court of Chancery; and at the same time it became the duty of the Court to protect her interests, or to see that they were duly protected. The usual and regular mode of doing this is by appointing guardians. It is true that if an infant be improperly detained by any unauthorized person, the LORD CHANCELLOR may, by writ of *habeas corpus*, have the infant brought before him and set free. But upon a *habeas corpus* I apprehend that the LORD CHANCELLOR has no more authority than is possessed by a Judge at common law; and for the protection of the infant, that authority is of a very different kind and of greatly inferior efficacy to that which is possessed by the Court of Chancery on the appointment of a guardian.

The order complained of refers it to the Master to approve of proper persons to be guardians, to inquire and state the infant's age, what relations she has, and the nature and amount of her fortune, and on what grounds he approves of any particular persons to be guardians; and he was to consider a scheme for the residence of the infant, and what would be proper to be allowed for

JOHNSTONE  
v.  
BEATTIE.

[ \*147 ]

JOHNSTONE  
v.  
BEATTIE.

her maintenance and education. This is very nearly the order which, in ordinary cases, is made by the Court for the protection of infants, within its jurisdiction, on whose behalf its protection is required. The guardians appointed under such orders are properly to be considered, as has been stated by my noble and learned friend, as officers of the Court appointed to carry its intentions into effect and to act under its control for the benefit of the infants.

[ \*148 ]

\*In approving of guardians under the order, the Master is bound to use his best discretion to make all necessary and proper inquiries, and to take all the circumstances of the infant into his consideration. The Scotch tutors and curators, whom I assume for the purpose to have been properly appointed, being out of the jurisdiction and consequently not subject to the control and authority of the Court, it would not seem to be consistent with sound discretion to appoint them sole guardians, unless other arrangements could be at the same time made to secure for the infant that protection which it is the duty of the Court to afford.

But it may be admitted, and I think properly, that the appointment of tutors and curators by the father, though it may not be valid in England, is entitled to the greatest and most attentive consideration, and that the Court of Chancery would be strongly inclined to act upon it so far as it could consistently with its duty of maintaining that authority over the infant which is so entirely necessary for the protection of the infant while in England. One obvious mode of attending to the appointment made by the father of tutors and curators resident in Scotland, and at the same time of securing the authority and control of the Court over the person of the infant while in England, would be to associate in the guardianship some persons residing in England, with the tutors and curators residing in Scotland; and when we are considering a case of discretion, it is important to observe that an offer of this kind was made to the complaining parties by the LORD CHANCELLOR, before he pronounced the order now in question.

[ \*149 ]

It has been supposed that the order will lead to a direct conflict between the laws or the Courts of \*England and Scotland, and that the order is so expressed as wholly to exclude the Scotch tutors and curators from the office of guardians. I conceive this to be wholly erroneous; we ought to presume that the Courts of England and Scotland will be equally anxious to do that which may appear to be most beneficial to the infant. The person is in the one country, the property is said to be wholly in the other. Instead of

conflicting with one another, why should not the respective Courts of the two countries be mutually assistant in promoting their common object? We are not to presume the existence of any feeling likely to prevent them from so acting as to promote the common object, in the manner authorized by their respective and independent jurisdictions and forms; and although it is not to be expected that either the Master would approve or the Court appoint persons resident out of the jurisdiction to be sole guardians; yet there is nothing in the order to prevent the Scotch tutors and curators from proposing themselves to be guardians together with one or more persons resident in England, who might also be proposed by themselves, approved of by the Master, and appointed by the Court; and in the peculiar circumstances of this case it may possibly appear, upon the inquiry before the Master, that it would be beneficial to the infant to have guardians both in England and Scotland.

JOHNSTONE  
†.  
BEATTIE.

One part of the order requires the Master to consider of a scheme for the residence of the infant; and it being supposed in the argument that there is some general and inflexible rule binding the Court to keep its infant wards within the jurisdiction, it is thence inferred that under this order the Master cannot consider whether the infant ought at any time to be permitted \*to reside in or to visit Scotland. It is undoubtedly a general and useful rule that an infant ward is not to go out of the jurisdiction without special leave, and in the absence of special circumstances; but when special circumstances occur—and it may appear by the Master's report that they exist in this case—the special leave is always given. There are infant wards of the Court now abroad with leave given, sometimes for the general benefit of the infants, sometimes for the sake of health or peculiar instruction, and even for the sake of amusement. The infants who become wards of the Court of Chancery have indeed great and peculiar protection, but they are not debarred of any freedom or of any advantages which the most careful, considerate, and liberal parent would desire his child to possess.

[ \*150 ]

Those who imagine that the Court acts necessarily upon any fixed and inflexible rules in the management of infants, appear to me to forget the paternal and discretionary nature of the jurisdiction, the great care and anxiety with which the interests of the infant wards are constantly attended to, the changes of regulation which are so easily made even from day to day, if required by

JOHNSTONE  
v.  
BEATTIE.

a change of circumstances, and the extent to which all technical and positive rules are made to bend to the peculiar circumstances which may be from time to time presented by individual cases.

[ \*151 ]

I consider it to be premature and useless to speak of plans of management, and the consequences of them, or the difficulties of carrying them into execution, till the subject has been fully investigated, and the facts are ascertained and stated, and the plan is proposed in the Master's report. But I may perhaps be allowed to observe, that if it should ultimately \*appear most beneficial to the infant to reside sometimes in Scotland, sometimes in England, if guardians were appointed, some or one of them resident in England and some or one of them resident in Scotland; and if it should unhappily become necessary to call upon the Courts of the two countries to exercise their powers, I know of nothing which would render it impracticable for the English Court of Chancery to order the guardian resident in England to deliver up the infant to the guardian resident in Scotland. And why should we doubt that the Scotch Courts would consider beneficial to the infant the same course of management, which upon evidence and consideration had been approved by the English Court of Chancery; and, if necessary, order the guardian resident in Scotland, being the tutor or curator there, to deliver up the infant to the guardian resident in England? I cannot anticipate differences of opinion, or that either of the Courts would have any difficulty in directing that which would be most beneficial to the infant. It is not reasonable to suppose that the guardians to be appointed under the order will conflict, or that the Courts of the two countries will conflict in such a matter. It is possible that in carrying out any scheme difficulties may arise, more especially if those whose duty it is to concur in all things for the benefit of the infant should refuse or neglect to do so. If difficulties should occur, they must be met as they best may, by adopting that course which under the circumstances shall appear to be for the benefit of the infant; but at present it does not appear to me that there is any difficulty whatever. The infant is here, and entitled to the protection of the Court of Chancery; and it is, amongst other things, to be inquired where she ought to reside.

[ \*152 ]

\*Whether she ought to remain here or to be sent to Scotland, it is in either case necessary to appoint a guardian who may have a legal control over her person, to protect her whilst here, or, if proper, to deliver her to the person duly appointed to protect her in Scotland.

It has been stated that it would be unsafe and imprudent to take the infant to reside in Scotland, and the tutors and curators have expressed no intention to remove her to Scotland; and in this state of things the complaint made of this order is somewhat singular. The tutors and curators seem to say that the infant ought to be in England, where she cannot be protected by the Courts of Scotland, which have no jurisdiction over her person in England. At the same time they say that she ought not to be protected by the Courts of Chancery in England; and therefore that in the result she ought to be left in England to the care or neglect of the tutors and curators resident in Scotland, free from the control of or responsibility to the laws relating to guardianship which prevail in either country.

My Lords, for the reasons which I have stated, I am of opinion the order complained of ought to be affirmed.

The judgment of the House was that the appeal be dismissed and the order complained of affirmed. No order as to the costs of the appeal.

JOHNSTONE  
v.  
BEATTIE.

[ 153 ]

## IN COMMITTEE OF PRIVILEGES.

### THE TRACY PEERAGE.

(10 Clark & Finnelly, 154—192.)

Evidence—Old prayer-book—Age of handwriting—Expert evidence—Tombstone—Inscription.

The case of a claimant to a Peerage depending on the genuineness of entries written in an old prayer-book, and dated 1728 and 1729, several witnesses, whose occupations for a long time made them so conversant with manuscripts of different ages, that they could take on themselves to name the period in which any manuscript previous to the year 1700 was written, were all of opinion that the entries were written in the early part and before the middle of the last century, and at or about the period of their dates.

Held, that such evidence is but small testimony, hardly entitled to any weight, especially as the book containing the entries was not satisfactorily identified.

A claimant to a Peerage, after his case was referred to the House of Lords, and evidence taken on it, presented an additional case, alleging an inscription on a tombstone in a churchyard in Ireland; which, if proved, would sustain his claim. The tombstone could not be produced. Several witnesses from the neighbourhood swore positively that they saw the tombstone and inscription about 20 years ago. There was no material discrepancy in their statements, nor were any witnesses called to contradict them.

Held, that the evidence was not sufficient of the existence of the tomb-

1839.

May 7.  
June 18.

1843.

March 21.  
May 2, 30.  
June 9.

Lord  
LYNDHURST,  
L.C.  
Lord  
CAMPBELL.  
Lord  
BROUGHAM.

[ 154 ]



THE TRACY  
PEERAGE.

stone or of the inscription ; and that the neglect of the claimant to produce this material part of his case earlier, induced a suspicion of fraud ; which could not be removed without the production of the tombstone, or of other witnesses of greater credit from the neighbourhood.

[ \*155 ]

A PETITION was presented to the House of Lords in the year 1835, by Joseph Tracy, of Geashill, in the King's County in Ireland, as Viscount Rathcoole, setting forth the creation and descent of the dignity of Baron and Viscount Tracy, of Rathcoole in the county of Dublin, and praying their Lordships to allow him to prove his right to vote at the election of representative Peers of Ireland (1). The House referred the petition to the Lords Committees for Privileges ; but before any \*proceeding was taken thereon, the petitioner died. His son and heir, James Tracy, then presented his petition to his late Majesty, praying that it might be “ declared and adjudged that he was entitled to the title and honours of Viscount and Baron Tracy, of Rathcoole in the kingdom of Ireland (2). That petition was referred by his Majesty to the *Attorney-General* (*Sir J. Campbell*), and with his report annexed was referred by her present Majesty to the House of Lords, and by the House to the Lords Committees for Privileges.

[ \*156 ]

The evidence produced in support of the petitioner's case before the Committee for Privileges, at their several sittings on the 7th May and 18th June, 1839, and 21st March, 1843,—consisting of inrolments, wills, registers of births and deaths, pedigrees, and monumental inscriptions,—showed that, by letters patent dated the 12th of January, 1642, Sir John Tracy, of Toddington, in the county of Gloucester, knight, was created Baron and Viscount Tracy of Rathcoole in the county of Dublin, in the kingdom of Ireland ; To hold to him and the heirs male of his body : That he was succeeded by his only son Robert, second Viscount Tracy, who, being twice married, had by his first wife seven sons, and by his second wife two sons, hereinafter mentioned : That John, the eldest of the seven sons, succeeded to the dignities on the death of his father in 1662, and was himself succeeded in the year 1687 by his eldest son William, fourth Viscount and Baron Tracy : That this William died in 1712, leaving an only son, Thomas Charles Tracy, fifth Viscount, who died in 1756, and was succeeded by his eldest son, also named Thomas Charles, who died without issue \*in 1792, when the titles devolved on his half-brother the Rev. Dr. John Tracy, seventh Viscount ; upon whose death, without issue, his only

surviving brother Henry Leigh Tracy became eighth and last Viscount and Baron Tracy, and died in 1797, leaving an only child, a daughter, afterwards the wife of Mr. Charles Hanbury, who thereupon took the name of Tracy, and has been lately created Lord Sudeley.

THE TRACY  
PEERAGE.

The only points worth notice that occurred in the reception of the above evidence were the following:

1. The incumbent of the united parishes of Doddington and Didbrooke, in Gloucestershire, being too old and infirm to attend the Committee with the registers, his curate for Doddington produced the registers of both parishes, saying, on cross-examination, that he was curate of the one parish only, and had the joint custody of the register thereof with the incumbent; that the two parishes had separate registers, kept in the same iron chest; and that there was another curate for Didbrooke parish.

To an objection taken by the *Attorney-General*, that the witness was not connected with Didbrooke, the counsel for the claimant submitted, and said he would on a future day produce that register by the curate of Didbrooke; and he did so.

2. The inrolment of the letters patent, dated 18th of Charles the First (1642), creating the dignity in Sir John Tracy, being produced by a clerk from the Record Office in the Rolls Chapel, the Committee inquired whether search had been made for the original. The counsel for the claimant answered that the letters patent could not be in the possession of the claimant, nor in any possession to which he could get access: he did not inherit any property from, nor was he, \*personal representative of, the last Viscount; and therefore he had no muniments to refer to, nor was he entitled to search among the muniments in the possession of those who have the family property.

[ \*157 ]

The Committee then received the inrolment, and an examined copy thereof was given in and read.

3. Mr. King produced from the Heralds' College a book containing a pedigree, among others, of the Tracys, signed by two persons of that name. He described it as the original visitation book of the county of Gloucester, taken in 1623 of William Camden, Clarenceux King-at-Arms, in pursuance of a commission of visitation granted to him by James the First. The book had no title-page or date, nor did Camden's name appear in it; but it appeared from an inrolment, before received in evidence, that a commission of visitation was

THE TRACY  
PEERAGE.

granted to him the 1st of James the First, and there was no doubt that he was Clarenceux King-at-Arms and living in 1623. The book was numbered C. 17, and had the same appearance, in all respects, as the other visitation books in the College, of prior and subsequent dates; as those numbered C. 16 and C. 18. The pedigrees in book C. 17 had the date 1623.

The *Attorney-General* objected to the reception of this book, without prejudice to its being offered again if further evidence could be given of its authenticity; and the counsel for the claimant withdrew it, but afterwards, on the production of certain wills supplying such evidence, the *Attorney-General* withdrew his objection, and the pedigree was received.

[ \*158 ]

The further evidence taken at the sittings of the Committee on the 2nd and 30th May, 1843, showed that, in 1797, all the male descendants of Robert, the second Viscount and Baron Tracy, by his first \*wife, were extinct, and therefore the succession to the dignities opened to his male descendants by the second wife; by whom, as before stated, he had two sons, namely Robert Tracy and Benjamin; that this Robert was a member of the Middle Temple, called to the Bar in 1673, and appointed a Judge of the Court of Common Pleas at Westminster in 1700; that he retired from the Bench in 1726, and died in 1735, at the age of 80 years.

The petitioner sought to derive his descent directly from Judge Tracy; and his statement was this: that the Judge had three sons: first, Robert, who died without issue; second, Richard, who left an only son who died without issue,—all which was clearly proved;—and third, William: that this William, whom the petitioner claimed for his ancestor (his great grandfather), settled in Ireland, having incurred his father's displeasure by marrying a Miss Mary O'Brien, daughter of a merchant in Dublin; that by his said wife he had two sons, James Tracy and Timothy, both born in Dublin in 1729 and 1730 respectively; after which he removed with them and their mother to a place called Ross, in the King's County, and dying there in 1734, was buried in Castlebrack, in the Queen's County; that his eldest son, James, lived at Gurteen, in the parish of Geashill before mentioned, and died there in 1794, leaving, besides other issue, the first-mentioned petitioner, Joseph Tracy, his eldest son, the father of this claimant.

To prove that the Judge had a son named William (which was one of the difficulties of the case), the register of St. Andrew's,

Holborn, was produced, showing an entry, dated the 22nd of February, 1698, of the baptism of "William, son of Robert Tracy, Esq., and Ann, in Tuck's Court;" but there was no \*proof that this Robert Tracy was the Robert who became the Judge. Reference was also made to a statement in "the Baronetage of England, by Arthur Collins," published in 1720, that Mr. Justice Tracy had three sons, Robert, Richard, and William, then living; but this statement was not admissible in evidence. A family prayer-book was next produced, containing the following entries; on the title page:

THE TRACY  
PEERAGE.

[ \*159 ]

"James O'Brien, September 1st, 1730:"

and on the other side of that page,—

"Married in Dublin, April 17th, 1728, William, son of the Honourable Robert Tracy (late one of the English Judges), to Mary, daughter of Mr. James O'Brien, merchant."

"James Tracy, their eldest son, born January 27th, 1729."

"Timothy Tracy, second eldest, born June 26th, 1730."

And on page 39 of the same book, on the backs of two copper-plates:

"This book belonged to my grandfather, James O'Brien, afterwards to my father William Tracy, who was an Englishman: it contains the entry of his marriage, and the births of my elder brother James and my own. I now give it to my nephew, Joseph Tracy of Geashill.

"Coole, August 10th, 1796.

TIMOTHY TRACY."

A second printed case, laid by the claimant before the Committee by leave of their Lordships, contained, in addition to the above statements, a reference to an inscription on a tombstone, which was stated to have formerly stood in the burial ground of Castlebrack, in the Queen's County, and was as follows:

"Erected by Mary Tracy, to the memory of her husband William Tracy, Esq., late of Ross in the King's County, the third son of the Honourable Robert Tracy, late one of the Judges of the Common Pleas in England; who departed this life the 15th October, 1734."

And on the 2nd of May, 1843, several witnesses were \*examined respecting this tombstone inscription, and also the entries in the prayer-book. First, as to the prayer-book produced from the custody of the claimant; Mrs. Mary Atkin, examined by the *Solicitor-General*, who was then counsel for the claimant together with Sir

[ \*160 ]

THE TRACY  
PEERAGE.

living, and also his sisters, and their children, though the will does not take any notice of them.

Then, with regard to the will of Richard's son, he leaves his property to a cousin and his heirs. That affords presumptive proof that he died without any issue. Therefore the whole of the descendants from the Judge by his elder sons, Robert and Richard, have failed upon the death of the son of Richard.

[ \*173 ]

That being the state of the case in England, observation is now to be made with regard to William, the third son of the Judge. Assuming for a moment that the baptism of St. Andrew's, Holborn, in 1792, which is unaccounted for in any other way, and which seems not likely to relate to any other person, relates to the son of the Judge,—“the son of Robert Tracy, Esq., and Ann, his wife, in Tuck's Court,”—there is no trace to be found in England of the burial or marriage of that William, although numerous registers have \*been searched for that purpose. Then, there being no trace to be found of him after his birth in England, the question arises whether or not there is evidence to satisfy your Lordships that he had removed from this country to Ireland. Now, our statement, according to tradition, is, that he was married in Dublin. I do not know whether the affidavit of Carroll, to which my learned friend has referred, contains anything on that subject. I have not seen it before. I could not put it in evidence, though it is admissible in evidence against the claimant, who laid it before the *Attorney-General*.

LORD CAMPBELL :

Any document laid by a claimant before the *Attorney-General*, and, with his report, referred to the House, becomes evidence.

The *Attorney-General* read the passages before extracted from Carroll's affidavit, with emphasis on the passage stating that Mrs. Tracy died in 1750; which he said was 36 years before Mrs. Atkin's imaginary conversation with her in Dublin.

The *Solicitor-General* proceeded, [addressing himself to the question of the custody of the prayer-book] :

[ 175 ]

There is another observation to be made on the prayer-book. We have called before your Lordships certain witnesses for the purpose of deposing to the appearance of handwriting. That is evidence to which I neither on this or any other occasion would

say any implicit credit is to be given ; for I think parties are very likely to make mistakes as to the date or ages of handwriting ; but I think that evidence extremely valuable in this respect, that there is nothing in the character of the handwriting of this entry at all inconsistent with the date which it purports to bear.

THE TRACY  
PEERAGE.

LORD CAMPBELL :

Your second witness as to the handwriting, says he considers it impossible that that could be the handwriting of a person born in 1692.

THE LORD CHANCELLOR :

Yes, he said that certainly.

LORD BROUGHAM :

[ 176 ]

It is in the evidence of Sir T. Phillips : “ Do you think that that could be the handwriting of a gentleman of education who was born in the year 1692 ? ” — “ No, I do not think it could.”

THE LORD CHANCELLOR :

I think he said also that it might be the handwriting of a person living in 1730.

LORD CAMPBELL :

That it might be the handwriting of a person living in 1730, but not of a person born so long ago as the seventeenth century.

LORD BROUGHAM :

He is asked, “ You assign to this writing a period from 1740 to 1750 ? ” His answer is, “ About the middle of last century.” To be sure a person born in 1692 might have been living in 1750, he would be only 58 years of age : but he would retain the character of the writing as he learned and practised writing when a boy. I do not think this evidence is much to be depended upon.

*The Solicitor-General :*

It is clear that his impression was, that it was written by a person about the date he expressed ; though when he was asked whether it was likely to be the writing of a person born in 1692, he might feel some doubt.

THE TRACY  
PEERAGE.

THE LORD CHANCELLOR :

I think the utmost effect of that evidence is, that it amounts to nothing further than that the writing is not inconsistent with the date.

LORD BROUGHAM :

That there is nothing on the book which is inconsistent with the date; but a great deal of observation arises upon the view, I think.

*The Solicitor-General :*

The witnesses called for this purpose are persons constantly in the habit of examining into these matters. The first of them, Sir F. Madden, stated very positively his belief that it was the writing of that period.

[ 177 ] LORD BROUGHAM :

I do not think Sir F. Madden a very strong witness, though he was very zealous.

*The Solicitor-General :*

Those witnesses could have no interest in the matter, my Lord.

LORD CAMPBELL :

Certainly not; but then they are witnesses on one side, and I am very sorry to say that respectable witnesses are apt to form a strong bias. Those witnesses did, in my opinion, give very extraordinary evidence.

THE LORD CHANCELLOR :

He (Sir F. Madden) says, "I see no reason to the contrary." That is about the extent of it.

LORD BROUGHAM :

It is small testimony.

*The Solicitor-General :*

At all events the evidence is of this value, that those witnesses who are conversant with the writing of the time, and not only with the writing but with the appearance of the documents of the time, were of opinion on looking at this book that the writing was of the

date which it purported to be, and that the entry was a genuine entry. The prayer-book may be stated to have long belonged to the family; I am not aware of any observation arising upon the face of the book.

THE TRACY  
PEERAGE.

LORD BROUGHAM :

Will you read the entry?

*The Solicitor-General :*

“Married in Dublin, April 17th, 1728, William, son of the Honourable Robert Tracy, late one of the English Judges, to Mary, daughter of Mr. James O’Brien, merchant.”

“James Tracy, the eldest son, born January 27th, 1729.”

“Timothy Tracy, the second eldest, born January 20th, 1730.”

LORD BROUGHAM :

That is all written at the same time.

*The Solicitor-General :*

It appears so. Your Lordships \*have the evidence of Mrs. Atkin; you have the affidavit of Carroll; and there is this evidence, to which I have called your Lordships’ attention, as to the appearance of the writing, and of the book itself, which is produced from Mr. Tracy’s possession; and it will be for your Lordships to say what weight is to be given to that testimony. The book does not stand alone, for there is another matter in evidence, the tombstone, to which there have been many witnesses.

[ \*178 ]

LORD CAMPBELL :

Either the prayer-book or the tombstone would be sufficient, if the evidence of either was satisfactory.

THE LORD CHANCELLOR :

I think Mrs. Atkin never saw the book but once, and then it was put in her hand for a minute. This took place 57 years ago; and when she was examined by the attorney for the claimant, she says he never produced the book to her. She never saw it till she was at the Bar, and then having a glance at it, she said she thought it was the same book and the same handwriting. I think that is what she states. I am sure I should find it very difficult to speak to the identity of a book or inscription at such a distance of time.



THE TRACY  
PEERAGE.

LORD CAMPBELL:

I do not think she speaks to the identity of the book.

THE LORD CHANCELLOR:

She says it was of the same size and colour. That is all the evidence to the identity of the book. She may be mistaken with respect to the book.

The *Solicitor-General*:

With regard to the other head of evidence, the inscription on the tombstone; that rests upon a great quantity of evidence admitted at your Lordships' Bar.

LORD CAMPBELL:

[ \*179 ] According to the evidence at the \*Bar, when did this tombstone first come to the knowledge of the claimant?

The *Solicitor-General*:

I do not think there is any evidence of that.

THE LORD CHANCELLOR:

There was no evidence before the *Attorney-General* upon that tombstone.

LORD SUDELEY:

Nor any mention of it in the case in the year 1839.

LORD CAMPBELL:

As the evidence now stands, does it appear when that first came to the knowledge of the claimant?

The *Solicitor-General*:

I am not aware that it does, my Lord.

THE LORD CHANCELLOR:

I am quite satisfied that it does not.

The *Solicitor-General*:

I will call your Lordships' attention to the evidence upon that head. Your Lordships recollect a very respectable clergyman and several other witnesses, who spoke to the nature of the churchyard where this tombstone was. It appears to have been a very

unprotected place, and it is in evidence that from time to time tombstones were taken away by the people of the surrounding country : a person of the name of Macavoy is particularly mentioned as having taken away some of those tombstones for the purpose of building. We have generally very conflicting evidence upon the subject of tombstone inscriptions, as in the *Leigh Peerage*.

THE TRACY  
PEERAGE.

THE LORD CHANCELLOR :

There was conflicting evidence in that case, certainly.

The *Solicitor-General* :

A great deal. Witnesses were there called to prove that a monument existed in a particular place, and persons acquainted with the place were then called to contradict that testimony; and it is certainly worthy of observation in \*this case, that when we are told of a great number of persons living round this place, rather as a reflection on our not calling any respectable witnesses, there has been no contradiction of any sort to this statement with regard to the monument. No less than seven witnesses have spoken to the inscription. It was recollected for this reason, that it was a matter which excited considerable attention, that there should be buried in the churchyard of Castlebrack in Ireland, the son of a Judge in this country. Persons having been asked to note that fact, and the inscription being impressed upon their minds, they are able therefore to state to your Lordships that they did see such a monument with such inscription at the time.

[ \*180 ]

The *Solicitor-General*, after reading from the printed evidence the examination and cross-examination of the witnesses to the tombstone, and explaining what appeared obscure or confused in their testimony \* \* submitted, that unless the *Attorney-General* was prepared to offer some evidence to contradict these witnesses, the case of the claimant was made out.

[ 181 ]

LORD CAMPBELL :

Can you afford any explanation why the inscription on the tombstone was not brought forward till so late? It appears in the *Attorney-General's* report, which is lying on the table, and to which their Lordships will refer, that no such evidence was laid before him in 1836, nor was it brought before the House in 1838, when the first case was printed. I am most anxious to hear any explanation why this tombstone evidence was not brought forward

THE TRACY  
PEERAGE.

at an earlier period of the proceedings; for some of these Tracys were living at no great distance, and this tombstone appears, according to the account of the witnesses, to have been very well known. The inscription is decisive, if genuine, and therefore one is startled at least at its not being furnished at an earlier stage.

THE LORD CHANCELLOR :

If it was talked about, it is extraordinary it was not brought forward by the family. The reason the witnesses gave for remembering it is, that it was thought an extraordinary circumstance.

LORD BROUGHAM :

So extraordinary that one of them took a copy of it 30 years ago.

LORD CAMPBELL :

[ \*182 ] The evidence would have been quite decisive, if satisfactory. Why then should it \*not have been brought forward when the claim was made by the father or the son? It appears, by the *Attorney-General's* report, that the case at that time rested only on the prayer-book.

LORD BROUGHAM :

I am not satisfied with what the witnesses say, that the people living in the neighbourhood would build houses with tombstones: I think those are the very last things they would take. The Irish people regard all these things with too much veneration to use them in that way.

THE LORD CHANCELLOR :

The claim has been depending more than seven years, and the tombstone is said to have been in existence about 15 years ago.

LORD BROUGHAM :

And the memorandum taken by Mr. Tarlton is sworn to have been kept 15 years after 1813. When the witness is asked, "Why did you keep the memorandum about the tombstone?" he says, "Because an uncle of mine was connected with the family."

THE LORD CHANCELLOR :

Ten years before the claim it was known, according to the evidence, to many persons in the district. It is almost impossible

that it should not have reached the ears of these parties, if it was true. There was some evidence to show that there were gentlemen living in the neighbourhood and connected with the parish; but no attempt has been made to produce them. That, it may be said, cuts both ways; but in a claim of Peerage, one would expect the very best evidence of such an inscription to be brought forward by the claimant, who is bound to make out his case. It being now brought forward, it should be accredited by persons of education and character in Ireland: such evidence would have been very material. There was an examination as to the \*names of persons of respectability living in the neighbourhood.

THE TRACY  
PEERAGE.

[ \*183 ]

*The Solicitor-General :*

In the examination of the first witness, the *Attorney-General for Ireland* referred to such persons. From that description of examination, I thought it referred to persons whom he meant to produce. The witness Quarter is asked, "How many priests are there belonging to the chapel of Cloncudeny?"—"Three." Then he is asked, "Do you know any other gentleman living in the neighbourhood, who was living there 25 years ago?"—"Yes, Mr. Meredith." "Is he a gentleman?"—"A gentleman farmer." "Was he resident there 20 or 25 years ago?"—"Near where I live now." "When you left Castlebrack 25 years ago, when you saw the tombstone, were there any gentlemen resident there who are now living?"—"The son of Mr. Mackavoy was there." "Is he alive still?"—"Yes." "Is there any other gentleman of that neighbourhood, besides Mr. Mackavoy, who was there 25 years ago?"—"There is Mr. Delany." "How near to the churchyard does he live?"—"Two miles, or a mile and a half." "Did he ever go to the churchyard?"—"Yes." "He is still alive?"—"Yes."

**LORD BROUGHAM :**

There were in Ireland means to have got the most respectable persons, who are thus vouched to have been living there 25 years ago, and who, therefore, must have recollected the tombstone if it was there. One respectable man who was known in the country, some neighbouring gentleman, would have been quite invaluable.

**THE LORD CHANCELLOR :**

The question is whether, in a case of Peerage, we can safely act upon this: we are here as a jury.

THE TRACY  
PEERAGE.

*The Solicitor-General :*

[ \*184 ]

I do not apprehend there is any distinction between such witnesses as are \*adverted to by one of your Lordships, and Patrick Boyne. I should have said that he is a witness to whom his Lordship's observation would apply.

LORD SUDELEY :

Patrick Boyne mentioned several gentlemen, as Mr. Warburton and Mr. Newcombe and others.

*The Solicitor-General :*

But here are these seven witnesses, speaking to the fact ; if any one of those respectable gentlemen living on the spot was aware of that fact being mis-stated, he might have been brought to contradict them.

THE LORD CHANCELLOR :

But the affirmative lies upon you.

*The Solicitor-General :*

My Lords, there are persons who have a strong interest in opposing this claim ; and I must say it is remarkable that, if it can be met, it is not met.

THE LORD CHANCELLOR :

We know nothing of any parties. The *Attorney-General* appears here for the Crown, and our duty here is to advise the Crown. The case of the claimant should be made out beyond all suspicion or doubt. It is a matter in which we cannot retrace our steps. You may come again if you can mend your case ; but if we come to a wrong conclusion in admitting the claim, it is final. However the question is, whether upon your case we at present are satisfied with the evidence. I do not think there is sufficient evidence of the identity of the book : I am not convinced as to the identity of the book, depending upon the testimony of that one witness, Mrs. Atkin.

*The Attorney-General :*

[ \*185 ]

I will satisfy your Lordship in a moment ; I will not trouble you with any other evidence but that relating to that book. It is clear that Mary O'Brien died in 1750 ; it is so stated \*in the case printed in 1838, and her grandson (Carroll) discloses that that was the fact.

THE LORD CHANCELLOR :

THE TRACY  
PEERAGE.

But then they say that there is no certificate of burial in 1750, and there is in 1787.

*The Attorney-General :*

There is nothing to identify the certificate which appears on the evidence, and it is contradicted by the witness, who states that his grandmother was buried at Castlebrack in 1750, along with her husband.

*The Solicitor-General :*

Mrs. Atkin says that she was buried at the Round Church in Dublin.

THE LORD CHANCELLOR :

Then you produce a certificate from the Round Church ; what are the terms of it ?

*The Solicitor-General :*

“ Mrs. Tracy, widow.”

*The Attorney-General :*

There are many widow Tracys in Ireland.

*The Solicitor-General :*

Carroll, in his statement before the *Attorney-General* in 1836 states that, according to his belief, his grandmother died in 1750. Surely that can be no answer to this certificate, corroborated by the evidence of Mrs. Atkin, who has sworn positively to the fact that she was living in 1786, and died in 1787.

*The Attorney-General* read Carroll's affidavit of the conversations he had heard between his mother and uncle about their family :

“ Deponent heard them also say that their mother was buried at Castlebrack, in the Queen's County, with their father.” That is the statement the grandson gives as the statement made in his hearing by his uncle, one of the children of William and Mary. Against this my learned friend puts in the testimony of a witness, who answers an advertisement subsequently to the case being on your Lordships' table ; \*and your Lordships will find from the

THE TRACY  
PEERAGE.

particular period that it is impossible those members of the family should not know when their mother died, and where she was buried. This is the case the claimant put forward in 1836, before the then *Attorney-General*; and in his old case, which your Lordships have upon your table, you will find this statement: "William Tracy (the Judge's son) died in 1734, and Mary his wife, late Mary O'Brien, in 1750; and were both buried at Castlebrack, in the Queen's County, in Ireland." That is the claimant's own statement. \* \* \*

*The Solicitor-General:*

[ 187 ]        \* \* With regard to the statement of my learned friend  
\*188 ] as to Carroll's affidavit, I conceive that it is of no \*weight. It is a statement of tradition, made by a party many years afterwards. He says he heard it stated in the family that a certain party died in a particular year; and the whole objection to the claim is to rest on that mistake of the person making that affidavit. There is no other attempt at objection made, except by saying that the claimant makes this statement, proceeding on that affidavit, part of his printed case. The claimant only copies the affidavit; and proceeding on it, he puts down the death of Mrs. Tracy as in 1750, because Carroll in 1836 says she died in that year. But when you have a witness who speaks to the fact of having seen her in the year 1786, in Dublin, and to conversations with her, then are you to believe that, or to say that that witness is guilty of perjury, because a witness, who speaks from the statements of others, states his belief that she died in 1750? I humbly submit to your Lordships upon this evidence, uncontradicted, that the claimant has made out his case. We show that the William Tracy buried at Castlebrack was the son of an English Judge; and if so, supported as that is by the other parts of the case, the claimant is, I submit, clearly entitled to this Peerage.

The *Attorney-General* again read the greater part of Carroll's affidavit of what he had heard his mother and uncle say about their family.

THE LORD CHANCELLOR:

I have heard every part of the evidence, and I do not feel that we can report to the Crown that the claimant has established his case upon this testimony. I am not satisfied as to the identity of the book to which the witness speaks; nor am I satisfied as to the

existence of the tombstone. I should, therefore, humbly move your Lordships to resolve that the \*case has not been satisfactorily made out on the part of the claimant.

THE TRACY  
PEERAGE.  
[ \*189 ]

LORD BROUGHAM :

I entirely agree with my noble and learned friend ; I do not think the evidence at all satisfactory. I do not mean to impute any perjury to Mrs. Atkin ; the conversation she speaks to was 50 years ago ; she never had seen this prayer-book since, or looked into it until she saw it at this Bar. It is a very suspicious circumstance to my mind : she swore that when she was examined by Mr. Bourdillon he did not show her the prayer-book, and that she had not seen it since the year 1786, before she was brought here. To my mind the whole matter appears extremely suspicious ; and when I look at the autograph—without having the knowledge of Sir Frederick Madden, or Sir Thomas Phillips, of handwriting—I think there is not anything more plain than the fact that this is a schoolboy's hand. With respect then to the entry in the prayer-book, in my opinion its identity is not established.

As to the tombstone, I entirely agree with my noble and learned friend ; I think it is exceedingly dangerous to give credit to the evidence of these witnesses, having been brought forward at the eleventh hour and in the urgency of the case, when the case had been so long before the *Attorney-General* : and under the circumstances I do not think it incumbent upon the *Attorney-General* to call witnesses to disprove the existence of the tombstone, when its existence is proved only by the most unsatisfactory evidence.

LORD CAMPBELL :

I agree with my noble and learned friends that the claimant has not made out his case ; and I have the strong conviction that the case is founded in fraud and forgery. Your Lordships will \*observe that it was necessary that the claimant should prove that the person who was undoubtedly his ancestor, was the son of the English Judge. To support that, there is not a particle of written evidence. From the baptismal register of William, the son of the Judge, there is no doubt the Judge had a son William ; but there is not a particle of evidence to show that William, the son of the Judge, was the ancestor of the claimant. There is neither register, nor settlement, nor will ; but, on the contrary, the will of the Judge

[ \* 190 ]



THE TRACY  
PEERAGE.

is strong evidence to show that the Judge at that time had no son William alive; for in that will he appears to take notice of all the members of his family, but takes no notice whatever of that William. It is suggested that William had given him offence by going to Ireland and marrying a person of obscure station in life; but that is mere suggestion; there is no evidence of it whatever: the mere circumstance of the Judge taking no notice of William leads to a very strong inference that William had died before his father, and not that he was then alive, and had children alive, according to the evidence which is sought to be applied to him (1).

[ \*191 ]

When the case came before the *Attorney-General*, it was rested wholly upon this prayer-book. Now I should say, upon the whole appearance, this entry is a forgery; with the degree of knowledge I have acquired of handwriting, that is the view I have taken of the subject. The person supposed to have written this, is supposed to have been born in 1692. There was a witness (Sir Frederick Madden) who undertook to say that it was the handwriting of about the middle of the last century. I do not mean to throw \*any reflection on Sir Frederick Madden. I dare say he is a very respectable gentleman, and did not mean to give any evidence that was untrue; but really this confirms the opinion I have entertained; that hardly any weight is to be given to the evidence of what are called scientific witnesses; they come with a bias on their minds to support the cause in which they are embarked; and it appears to me that Sir Frederick Madden, if he had been a witness in a cause and had been asked on a different occasion what he thought of this handwriting, would have given a totally different account of it. Sir Frederick Madden and another witness, on the reference to the *Attorney-General*, stated their belief. Having the honour to hold the office of *Attorney-General* at the time this representation was made, I advised that the case should be referred to your Lordships; and now we have the evidence of Sir Frederick Madden and Sir Thomas Phillips; and they, I think, instead of their proving that this is or could be the handwriting of the person supposed to have written it, the effect of the evidence taken altogether shows that this cannot have been the handwriting of the person supposed to have written it; and I feel bound to suppose that this is an attempt to bolster up the case by a forged document. Any other evidence which there is, I must, under those circumstances, view with the

(1) It was in evidence that William 1734; and that Judge Tracy died in Tracy, the claimant's ancestor, died in 1735.

greatest suspicion; for it is not enough to say that they may discard this: that they have a very good case without it.

THE TRACY  
PERRAGE.

My Lords, with reference to the other part of the case, I was anxious to know from the *Solicitor-General* what plausible reason could be assigned for the tombstone not being brought forward at an earlier period. It would appear that this claim, first brought forward by the claimant's father, has been in agitation \*for 10 or 11 years; it was before the *Attorney-General* in the year 1836, having been begun, I believe, in 1832. If there had been a tombstone with this inscription on it, it must have inevitably been known to the claimant; he would have stated its existence in the original case, and brought it forward before the *Attorney-General*; there is not the slightest reason given for its not being brought forward, and I cannot help coming to the conclusion that it is brought forward finally, on the conviction that without it they could not succeed. It is proved in evidence that there are Tracys in that part of Ireland, but who appear to have been chiefly Roman Catholics. According to the affidavit which has been read, some of the members of this family were residing in that neighbourhood, and who therefore must have been aware of this inscription on the tombstone, if it existed. I am of opinion that the evidence which has been laid before your Lordships does not establish the claim; that it is defective; and that the case is attempted to be supported by forgery and perjury. I have no hesitation, therefore, in concurring in the motion made by my noble and learned friend, that the claimant has not made out his case.

[ \*192 ]

It was then resolved, that the claimant hath not made out his claim to the title, honour, and dignity of Viscount and Baron Tracy, of Rathcoole, in the kingdom of Ireland.

And it was ordered, that the Chairman do report the said resolution to the House.

The House affirmed the resolution, and the same was reported to her Majesty.

## IN COMMITTEE OF PRIVILEGES.

## THE FITZWALTER PEERAGE.

(10 Clark &amp; Finnely, 193—199.)

1843.

May 9.

Lord  
LYNDHURST,  
L.C.Lord  
BROUGHAM.

[ 193 ]

Evidence—Proof of handwriting—Professional witness—Solicitor.

On a claim to an ancient Peerage, a family pedigree, produced from the proper custody, and purporting to have been made by an ancestor of the claimant before the year 1751, was offered in evidence, on proof of the handwriting, by a witness who had been for many years inspector of franks and of official correspondence; and who said that, from a few inspections he had of two or three other documents which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced to him was or was not in the same handwriting. Held that the evidence was inadmissible.

Held that the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor, was a competent witness to prove the handwriting of the pedigree.

A POINT ON the admissibility of evidence, somewhat similar to the first point in the preceding case, was decided a few days previously in another case, which is still pending before the Committee of Privileges. This was the claim of Sir Brook William Bridges, Bart., to the Barony of Fitzwalter, which was created by writ of summons in the year 1295, and fell into abeyance in 1756, on the death of Benjamin Mildmay, the 17th and last Lord Fitzwalter, without surviving issue.

*Mr. Loftus Wigram* and *Sir Harris Nicolas*, the claimant's counsel, proposed to put in evidence some family pedigrees, which were produced from the proper custody; no objection was made to them in that respect. They purported to have been made by \*Edmund Fowler, who was proved to have died in 1751. He had stood in the direct line of the claimant's ancestors, being the father of his grandmother, one of the coheiresses to the Barony, being also third son and, in the events which happened, heir of Francis Mildmay (or Fowler), who was first cousin and coheir of the said Benjamin, last Lord Fitzwalter. So that if those pedigrees could be proved to have been of the writing of this Edmund Fowler, they would be admissible in evidence for the claimant, as declarations made by a deceased relative of circumstances respecting

[ \*194 ]

the state of his family and immediate relatives (1). They had been offered in evidence before the *Attorney-General*, on the reference of the claimant's petition to him, but were rejected for want of proof of the handwriting.

THE  
FITZWALTER  
PEERAGE.

The way in which it was proposed now to prove the handwriting was this: first, by producing from the Prerogative Office Mr. Fowler's will,—already received in evidence for other purposes,—and four other documents, which were proved to be of his handwriting: namely, a confidential letter written by him to the steward of his manor of St. Clear's Hall, Essex; another letter by him, appointing a gamekeeper within that manor; a memorandum in an account book; and a deed of settlement of property comprised within the said manor. These were produced from the closet containing the claimant's family muniments, including the title-deeds of the said manor and property, which now belong to him in right of his grandmother. It was proved that the deed of settlement had been repeatedly, and very recently, acted upon, and that all the documents had the genuine signature of "E. Fowler." It was next proposed \*to prove the identity of the signer of those documents with the writer of the pedigrees, by comparison of the handwriting of the latter, with the signatures to the proved documents; and for that purpose,—

[ \*195 ]

Mr. Lewis Silvester Clarac was examined :

He said, in answer to the questions put to him by the counsel and Lords, that he held for 18 years the office of inspector of franks in the General Post Office; and after the abolition of the franking privilege, he had become inspector of official correspondence: that he had much experience in distinguishing the characters of handwriting, and was consulted on this matter upon important occasions. Being then asked if he had examined the signatures of E. Fowler to three of the documents, the deed, the will, and the appointment of gamekeeper, all which were produced to him, he said he had examined the signature to the will in the Prerogative Office twice, and looked four or five times at the signatures to the letter and other documents of Edmund Fowler, and to the handwriting of the entries in the account book and of queries on the pedigree of the Mildmay family, at the office of the claimant's solicitor; and he considered that by the inspections he had made, he was so familiar with the handwriting of the person by whom these documents were

(1) See *Vowles v. Young*, 9 R. R. P. 157 (13 Ves. pp. 143 *et seq.*)

THE  
FITZWALTER  
PEERAGE.

written or signed, that, without any immediate comparison with them, he should be able to say whether any other document produced was or was not in the handwriting of the same person. He believed all these documents to have been signed by the same person; and he did not form his opinion merely from the signatures, but more from the general similarity of the letters, which, he said, were written in a remarkable character.

[ 196 ]

The *Attorney-General*, having before objected to the examination of this witness, again submitted that his evidence was not receivable, not being the knowledge of handwriting acquired by a person in the ordinary course of business, giving him a practical acquaintance with the writing of a particular person. The rule of admitting professional skill in handwriting had been carried too far, and ought not to be extended. The courts of law were accordingly becoming more strict. This witness was not familiar with the handwriting, which he undertook to prove, from a course of business, like a party's solicitor or steward, or like a parishioner admitted as a witness in some cases; but he had studied the handwriting for the purpose of speaking to the identity of the writer. A person who reads a medical or chemical book with the utmost attention, for the purpose of giving evidence on a question of medicine or chemistry, is not an admissible witness for such purpose.

*Mr. Wigram*, being asked by Lords of the Committee whether he could refer to any case in which a person who had studied handwriting for the purpose of evidence was allowed to be examined, referred to 1 Phillips on Evidence, p. 492 (7th edit.), and to 2 Starkie, p. 375 (2nd edit.), and cited some of the cases mentioned in the notes to those passages: *Brune v. Rawlings* (1), *Taylor v. Cooke* (2), *Doe d. Tilman v. Tarver* (3), and *Smith v. Sainsbury* (4). He added that *Mr. Starkie*, in the passage referred to, says, "Where the antiquity of the writing makes it impossible for a witness to swear that he ever saw the party write, comparison of handwriting with documents \*known to be in his handwriting has been admitted;" and he then in a note cites the authorities for that doctrine. But this witness goes farther than actual comparison of the handwriting; for he says emphatically, that from the inspections he has had of the handwriting in the admitted

[ \*197 ]

(1) 8 R. R. 632 (7 East, 283, n.).

(2) 8 Price, 652.

(3) 1 Ry. & M. 141.

(4) 38 R. R. 802 (5 Car. & P. 196).

documents, his mind is so impressed with the character that he is able, without immediate comparison with them, to say whether any document produced to him is in the handwriting of the same person. And that is the way in which the rule was laid down by Mr. Justice HOLROYD in *Sparrow v. Farrant* (1), and in *Maddock v. Lyne* (2). It was material to notice that these pedigrees were old writings produced from the proper custody, and on that ground admissible, though subject to observation.

THE  
FITZWALTER  
PEERAGE.

*The Attorney-General :*

The rule in the Court of Queen's Bench is now much more strict than it was when the cases referred to occurred, and most of them are cases at Nisi Prius and on the circuits.

The LORD CHANCELLOR and Lord BROUGHAM, after looking into some of the cases referred to, said the pedigree could not be received on the sort of proof of the handwriting now offered.

Lord BROUGHAM added that, about five years ago, the Lord Chief Justice of the Court of Queen's Bench did him the honour to consult him on this sort of evidence; and their joint impression was, that if the cases of *Doe v. Tarver*, and *Sparrow v. Farrant*,—one before Lord Chief Justice Abbott, and the other before Mr. Justice Holroyd,—were correctly reported, they had gone farther than the rule was ever carried. In the present case his noble and learned friend (the \*LORD CHANCELLOR) and himself were clearly of opinion that they ought not to allow a person to say from inspection of the signatures to two or three documents—two only, the deed and will, being genuine instruments, admitted to be in the handwriting of Edmund Fowler,—from the inspection of those two documents, that he could prove the handwriting of the party. No doubt such evidence had been often received, because it was not objected to. A witness was properly allowed to speak to a person's handwriting from inspection of a number of documents with which he had grown familiar from frequent use of them; and it was on that ground that a person's solicitor and steward were admitted to prove his handwriting.

[ \*198 ]

*Mr. Wigram* referred to a case of a trial at Bar, *Revett v. Braham* (3), in which an inspector of franks at the Post Office was

(1) 2 Stark. Evi. 375, n. x.

(3) 4 T. R. 497.

(2) 1 Phil. Evi. 492, n. 1.

THE  
FITZWALTER  
PEERAGE.

admitted to say, as a matter of skill and judgment, whether the name signed to a will was genuine or in a feigned hand.

LORD BROUGHAM:

Yes, truly; for that is matter of professional skill (1). But that is no reason for admitting a witness to speak to the real handwriting of a person from only having seen a few of his signatures to other instruments produced to him, and that for the purpose of proving its identity.

[ \*199 ]

Mr. Bridges, who said he had been the family solicitor of the claimant for more than 30 years, and, prior to that, had been clerk to his uncle, who was the family solicitor for 40 years, was then examined. Having, in answer to the questions put to him, said that he had acquired a knowledge of the character of the handwriting of Edmund Fowler from his acquaintance \*with a great number of title-deeds, account books, and other instruments purporting to have been written or signed by him, which he had occasion to examine from time to time in the course of business for his client, who now holds the Fowler estates,—he was admitted to prove the handwriting of the Mildmay pedigree; and he said he believed and felt no doubt whatever that the whole of it was in the handwriting of Edmund Fowler, with the exception of a few words near the bottom, which he pointed out.

The pedigree and some queries to it were received as being written by Edmund Fowler, with those exceptions mentioned by the witness; but,

The Lords of the Committee desired it to be understood that they were not received as proof that all the statements contained in them were true; one of their Lordships observing that pedigrees were sometimes made to deceive, being for the most part true, except a link or two, the most material of all.

Other points of evidence that occurred in the prosecution of this claim, will be reported when the case comes to be finally decided (2).

(1) *Sed vide ante*, p. 59.

(2) See p. 316, below.

## DANIEL M'NAGHTEN'S CASE.

(10 Clark &amp; Finnelly, 200—214.)

## Murder—Evidence—Insanity.

The House of Lords has a right to require the Judges to answer abstract questions of existing law (1).

Notwithstanding a party accused did an act, which was in itself criminal, under the influence of insane delusion, with a view of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable if he knew at the time that he was acting contrary to law.

That if the accused was conscious that the act was one which he ought not to do; and if the act was at the same time contrary to law, he is punishable. In all cases of this kind the jurors ought to be told that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction: and that to establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or as not to know that what he was doing was wrong.

That a party labouring under a partial delusion must be considered in the same situation, as to responsibility, as if the facts, in respect to which the delusion exists, were real.

That where an accused person is supposed to be insane, a medical man, who has been present in Court and heard the evidence, may be asked, as a matter of science, whether the facts stated by the witnesses, supposing them to be true, show a state of mind incapable of distinguishing between right and wrong.

THE prisoner had been indicted for that he, on the 20th day of January, 1843, at the parish of St. Martin in the Fields, in the county of Middlesex, and within the jurisdiction of the Central Criminal Court, in and upon one Edward Drummond, feloniously, wilfully, and of his malice aforethought, did make an assault; and that the said Daniel M'Naghten, a certain pistol of the value of 20s., loaded and \*charged with gunpowder and a leaden bullet (which pistol he in his right hand had and held), to, against and upon the said Edward Drummond, feloniously, wilfully, and of his malice aforethought, did shoot and discharge; and that the said Daniel M'Naghten, with the leaden bullet aforesaid, out of the pistol aforesaid, by force of the gunpowder, &c., the said Edward Drummond, in and upon the back of him the said Edward Drummond, feloniously, &c. did strike, penetrate and wound, giving to the said Edward Drummond, in and upon the back of the said Edward Drummond, one mortal wound, &c., of which mortal

1843.  
May 26.  
June 19.

Lord  
LYNDHURST,  
L.C.  
Lord  
BROUGHAM.  
Lord  
COTTENHAM.  
Lord  
WYNFORD.  
TINDAL,  
Ch. J.  
MAULE, J.  
[ 200 ]

[ \*201 ]

(1) See *London and Westminster Bank case*, 37 R. R. 55 (2 Cl. & F. Judges' answers, see Stephen, *Hist. Crim. Law*, ii. 153 *sqq.*—F. P.]  
191). [As to the authority of the



M'NAGH-  
TEN'S CASE

wound the said E. Drummond languished until the 25th of April and then died; and that by the means aforesaid, he the prisoner did kill and murder the said Edward Drummond. The prisoner pleaded Not guilty.

Evidence having been given of the fact of the shooting of Mr. Drummond, and of his death in consequence thereof, witnesses were called on the part of the prisoner, to prove that he was not, at the time of committing the act, in a sound state of mind. The medical evidence was in substance this: that persons of otherwise sound mind, might be affected by morbid delusions: that the prisoner was in that condition: that a person so labouring under a morbid delusion, might have a moral perception of right and wrong, but that in the case of the prisoner it was a delusion which carried him away beyond the power of his own control, and left him no such perception; and that he was not capable of exercising any control over acts which had connexion with his delusion: that it was of the nature of the disease with which the prisoner was affected, to go on gradually until it had reached a climax, when it burst forth with irresistible \*intensity: that a man might go on for years quietly, though at the same time under its influence, but would all at once break out into the most extravagant and violent paroxysms.

[ \*202 ]

Some of the witnesses who gave this evidence, had previously examined the prisoner: others had never seen him till he appeared in Court, and they formed their opinions on hearing the evidence given by the other witnesses.

LORD CHIEF JUSTICE TINDAL (in his charge):

The question to be determined is, whether at the time the act in question was committed, the prisoner had or had not the use of his understanding, so as to know that he was doing a wrong or wicked act. If the jurors should be of opinion that the prisoner was not sensible, at the time he committed it, that he was violating the laws both of God and man, then he would be entitled to a verdict in his favour: but if, on the contrary, they were of opinion that when he committed the act he was in a sound state of mind, then their verdict must be against him.

Verdict, Not guilty, on the ground of insanity.

This verdict, and the question of the nature and extent of the unsoundness of mind which would excuse the commission of a

felony of this sort, having been made the subject of debate in the House of Lords (1), it was determined to take the opinion of the Judges on the law governing such cases. Accordingly, on the 26th of May, all the Judges attended their Lordships, but no questions were then put.

M'NAGH-  
TEN'S CASE.

On the 19th of June, the Judges again attended the House of Lords; when (no argument having been \*had) the following questions of law were propounded to them :

[ \*203 ]

1st. What is the law respecting alleged crimes committed by persons afflicted with insane delusion, in respect of one or more particular subjects or persons : as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit ?

June 19.  
—

2nd. What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence ?

3rd. In what terms ought the question to be left to the jury, as to the prisoner's state of mind at the time when the act was committed ?

4th. If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused ?

5th. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act, that he was acting contrary to law, or whether he was labouring under any and what delusion at the time ?

MR. JUSTICE MAULE :

[ 204 ]

I feel great difficulty in answering the questions put by your Lordships on this occasion : First, because they do not appear to arise out of and are not put with reference to a particular case,

(1) The 6th and 13th March, 1843; see Hansard's Debates, vol. 67, pp. 288, 714.

M'NAGH-  
TEN'S CASE.

or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions: this difficulty is the greater, from the practical experience both of the Bar and the Court being confined to questions arising out of the facts of particular cases: secondly, because I have heard no argument at your Lordships' Bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument: and thirdly, from a fear, of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the Judges may embarrass the administration of justice, when they are cited in criminal trials. For these reasons I should have been glad if my learned brethren would have joined me in praying your Lordships to excuse us from answering these questions; but as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned; fearing that my answers may be as little satisfactory to others as they are to myself.

[ \*205 ]

The first question, as I understand it, is, in effect, what is the law respecting the alleged crime, when at the time of the commission of it, the accused knew he was acting contrary to the law, but did the act \*with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question, whether a person, circumstanced as stated in the question, is, for that reason only, to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding? and I am of opinion that he is not. There is no law, that I am aware of, that makes persons in the state described in the question not

responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as rendered him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Second, the questions necessarily to be submitted to the jury, are those questions of fact which are \*raised on the record. In a criminal trial, the question commonly is, whether the accused be guilty or not guilty: but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions, as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the Judge: a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

[ \*206 ]

Third, there are no terms which the Judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the Judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourth, the answer which I have given to the first question, is applicable to this.

Fifth, whether a question can be asked, depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a crime, and defended on the ground of insanity, may be such, that such a question as either of those suggested, is proper to be asked and

M'NAGHTEN'S CASE.  
[ \*207 ]

answered, though the witness has \*never seen the person before the trial, and though he has merely been present and heard the witnesses: these circumstances, of his never having seen the person before, and of his having merely been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful ; though I will not say that an inquiry might not be in such a state, as that these circumstances should have such an effect.

[ \*208 ]

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence ; it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts, as makes it irrelevant to the inquiry. But such questions have been very frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of *Reg. v. M'Naghten*, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides ; and I think the course and practice of receiving such evidence, confirmed by the very high authority of these Judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its \*weight, ought to be held to warrant its reception, notwithstanding the objection in principle to which it may be open. In cases even where the course of practice in criminal law has been unfavourable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament.

LORD CHIEF JUSTICE TINDAL :

My Lords, her Majesty's Judges (with the exception of Mr. Justice MAULE, who has stated his opinion to your Lordships), in answering the questions proposed to them by your Lordships'

House, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing argument of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your Lordships' questions.

They have therefore confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your Lordships; and as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your Lordships.

[ \*209 ]

The first question proposed by your Lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your Lordships' inquiries are confined to those persons who labour under such partial delusions only, and are not in other respects insane, we are of opinion that, notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew at the time of committing such crime that he was acting contrary to law; by which expression we understand your Lordships to mean the law of the land.

Your Lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, where a person alleged to be afflicted with insane delusion respecting one or more

M'NAGHTEN'S CASE.

[ \*210 ]

particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when \*the act was committed?" And as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused at the time of doing the act knew the difference between right and wrong: which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course therefore \*has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong: and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

[ \*211 ]

The fourth question which your Lordships have proposed to us is this: "If a person under an insane delusion as to existing facts, commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature

of the delusion : but, making the same assumption as we did before, namely, that he labours under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if the facts with respect to which the delusion exists were real. For example, if under the influence of his delusion he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your Lordships is: "Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was labouring under any and \*what delusion at the time?" In answer thereto, we state to your Lordships, that we think the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

[ \*212 ]

LORD BROUGHAM :

My Lords, the opinions of the learned Judges, and the very able manner in which they have been presented to the House, deserve our best thanks. One of the learned Judges has expressed his regret that these questions were not argued by counsel. Generally speaking, it is most important that in questions put for the consideration of the Judges, they should have all that assistance which is afforded to them by an argument by counsel : but at the same time, there can be no doubt of your Lordships' right to put, in this way, abstract questions of law to the Judges, the answer to



M'NAGH-  
TEN'S CASE.

which might be necessary to your Lordships in your legislative capacity. There is a precedent for this course, in the memorable instance of Mr. Fox's bill on the law of libel; where, before passing the bill, this House called on the Judges to give their opinions on what was the law as it then existed.

LORD CAMPBELL:

[ \*213 ] My Lords, I cannot avoid expressing \*my satisfaction, that the noble and learned Lord on the woolsack carried into effect his desire to put these questions to the Judges. It was most fit that the opinions of the Judges should be asked on these matters, the settling of which is not a mere matter of speculation; for your Lordships may be called on, in your legislative capacity, to change the law; and before doing so, it is proper that you should be satisfied beyond doubt what the law really is. It is desirable to have such questions argued at the Bar, but such a course is not always practicable. Your Lordships have been reminded of one precedent for this proceeding, but there is a still more recent instance; the Judges having been summoned in the case of the *Canada Reserves*, to express their opinions on what was then the law on that subject. The answers given by the Judges are most highly satisfactory, and will be of the greatest use in the administration of justice.

LORD COTTENHAM:

My Lords, I fully concur with the opinion now expressed, as to the obligations we owe to the Judges. It is true that they cannot be required to say what would be the construction of a bill, not in existence as a law at the moment at which the question is put to them; but they may be called on to assist your Lordships, in declaring their opinions upon abstract questions of existing law.

LORD WYNFORD:

[ \*214 ] My Lords, I never doubted that your Lordships possess the power to call on the Judges to give their opinions upon questions of existing law, proposed to them as these questions have been. I myself recollect, that when I had the honour to hold the office of Lord Chief Justice of the Court of \*Common Pleas, I communicated to the House the opinions of the Judges on questions of this sort, framed with reference to the usury laws. Upon the opinion of the Judges thus delivered to the House by me, a bill was founded, and afterwards passed into a law.

## THE LORD CHANCELLOR :

M'NAGH-  
TEN'S CASE.

My Lords, I entirely concur in the opinion given by my noble and learned friends, as to our right to have the opinions of the Judges on abstract questions of existing law; and I agree that we owe our thanks to the Judges, for the attention and learning with which they have answered the questions now put to them.

## (APPEAL FROM THE ROLLS COURT.)

WITHY *v.* MANGLES (1).

(10 Clark &amp; Finnelly, 215—256; affg. 10 L. J. Ch. 391.)

By the settlement made on the marriage of E. M., the ultimate limitation of a sum of 10,000*l.*, which her father thereby covenanted to pay, was “to such person or persons as at the time of her death should be her next of kin.” E. M. died leaving her husband and a child of the marriage, and her own father and mother, surviving.

Held (affirming a decree of the MASTER OF THE ROLLS), that the father, mother, and child of E. M. were equally her next of kin, and were entitled, under the limitation, to the 10,000*l.* in joint tenancy.

By a marriage settlement, the wife's portion was limited to her for life, remainder to her husband for life, remainder to the children of the marriage to be vested at 21 or marriage, and in case none should attain that age or marry, then in trust for the brothers and sisters of the wife or their issue, as she should appoint; and in default of appointment, in trust for her next of kin.

Held, that the child of the marriage was not excluded from taking under the ultimate limitation.

By an indenture of settlement dated the 23rd of August, 1825, and made in contemplation of the marriage of Henry Withy and Emily Mangles, it was, among other things, provided, that within six months after the death of Robert Withy (the father of the intended husband), his executors should pay to the trustees of the settlement the principal sum of 5,000*l.*; and that within six months after the death of James Mangles (the father of the intended wife), his executors should pay to the trustees of the settlement the principal sum of 10,000*l.*: And the trustees were to invest the two sums and pay the interest of the 5,000*l.* to \*Henry Withy for life, with remainder to Emily Mangles for her life; and the interest of the 10,000*l.* to Emily Mangles for life, with remainder to Henry Withy for his life: And after the death of the survivor of them, the trustees were to hold both sums in trust for the children of the

1848.  
March 30, 31.  
April 6.  
June 30.Lord  
LANGDALE,  
M.R.  
Lord  
COTTENHAM.  
Lord  
CAMPBELL.

[ 215 ]

[ \*216 ]

(1) *Halton v. Foster* (1868) L. R. 3 Ch. 505, 37 L. J. Ch. 547, 18 L. T. 623;  
*Keay v. Boulton* (1883) 25 Ch. D. 212, 54 L. J. Ch. 48, 49 L. T. 631.

WITHY  
 v.  
 MANGLES.

marriage, in such manner as the parents should jointly, by deed executed as therein mentioned, or the survivor of them should, by such deed or by will, appoint; and in default of appointment, for the only child of the marriage, if there should be but one, and if more than one, in equal shares; and the whole or the shares to be considered an interest vested in a son or sons at 21, and in a daughter or daughters at 21 or marriage; and to be paid to him, her, or them, at such time or times, or as soon afterwards as the death of the survivor of the parents and other circumstances would admit; with provisions for survivorship and accruer among such children, in case of the death of any of them before that age, or marriage in case of daughters. And in case there should be no son living to attain 21, and no daughter living to attain that age or be married, the trustees were to stand possessed of the two sums of 5,000*l.* and 10,000*l.* upon the trusts following; that is to say, of the sum of 5,000*l.* on trust for the executors, administrators, and assigns of Robert Withy; and of the sum of 10,000*l.* in trust for such of the brothers and sisters of the said Emily Mangles or any of their issue, in such shares, &c. as she should by will appoint; and in default of such appointment, upon trust for such person or persons as, at the time of the death of Emily Mangles, should be her next of kin.

[ \*217 ] The settlement contained (among other provisoes and covenants not material to be mentioned) a covenant \*by Henry Withy with the trustees, in case the marriage should take place, and he, in right of his wife, should become entitled to any real or personal estate under the wills of her maternal aunt and grandfather therein recited, for the settlement thereof to the same uses and purposes as were expressed concerning the sum of 10,000*l.*

The marriage was duly solemnized, and there was issue thereof one child only, born the 5th of February, 1828, and named Emilius Henry Withy. The wife died on the 8th of February, 1828, leaving the child and her husband surviving; and the child died on the 15th of the same month of February, leaving his father, and his mother's father and mother, surviving. There was no appointment made of the 10,000*l.*

Henry Withy married again in 1829, and died in 1837, leaving his second wife surviving, to whom administration of his personal estate with his will annexed was granted, the executors therein named having renounced probate.

James Mangles died in September, 1838, having by his will

appointed his wife the mother of the said Emily, and his sons, executrix and executors. The sons alone proved the will. In six months after his death, according to the provisions of the said settlement, the 10,000*l.* became payable to such person or persons as, at the time of the death of Emily Mangles or Withy, was or were her next of kin. The surviving trustees of the settlement declined to take any steps to compel payment from the executors of James Mangles. One of the surviving trustees (the respondent F. Mangles) was also one of the executors.

WITHY  
v.  
MANGLES.

The appellant, the second wife of Henry Withy, having obtained administration of the estate of E. H. \*Withy, the child of the first wife, filed a creditor's bill in Chancery in 1839, against the executors of James Mangles and the surviving trustees of the settlement: And the bill, after stating the settlement and the events which happened as aforesaid, prayed, among other things, that it might be declared that, according to the true construction of the settlement, the 10,000*l.* became, on the death of Emily Withy, absolutely vested in her child E. H. Withy, as her only next of kin at her death, subject to the life interest of his father H. Withy, in case he should survive James Mangles, and that the same was transmissible to the legal personal representative of E. H. Withy; and that the said sum, with interest thereon from the death of James Mangles, might be ordered to be paid out of his personal estate to the appellant, as administratrix of E. H. Withy; and that the defendants, the executors, might either admit assets of the said testator, or that the usual accounts might be taken.

[ \*218 ]

The respondents, the executors of James Mangles, by their answer, submitted that, according to the true intent of the settlement and the trusts thereof, E. H. Withy did not, as the only child and sole next of kin of Emily Withy, become absolutely entitled to the said sum, subject to his father's life-interest therein; but that the said James Mangles became entitled thereto, subject to the life-interest of Henry Withy, on whose death he became absolutely entitled. And the respondents admitted assets of their testator sufficient for the purposes of the suit.

A decree was made on the hearing of the cause in July, 1840, referring it to the Master to make certain inquiries; and after the Master made his report, certifying facts before stated, the appellant filed a supplemental bill against Mrs. Mangles, widow of \*James Mangles and mother of Emily Withy. She put in an answer similar to that of the executors, and she thereby claimed such

[ \*219 ]

WITHY  
v.  
MANGLES.

interest in the 10,000*l.*, as according to the true construction of the settlement, and in the events which happened, she might, in the judgment of the Court, be entitled to.

Lord LANGDALE, M. R., before whom the cause again came to be heard, on further directions and on the Master's report, together with the supplemental cause, dismissed both bills with costs; holding that, under the ultimate limitation in the settlement, the child and the father and mother of Emily Withy were equally her next of kin at the time of her death, and as such were entitled to the said sum of 10,000*l.* in joint tenancy, subject to the life-interest of Henry Withy, in case he survived James Mangles; and that the child having died first and without severance of the joint interest, the appellant, as his personal representative, took no interest in the fund, the whole of it having then belonged to the surviving joint-tenants.

The plaintiff appealed from that decree.

*Mr. Tinney and Mr. Pemberton*, for the appellant (1) :

[ 232 ] *Mr. Kindersley and Mr. Humphrey* for the respondents.

[ 242 ] *Mr. Tinney*, in reply.

[The arguments of counsel and the cases cited by them sufficiently appear from the following judgment.]

June 30.

LORD COTTENHAM :

[ 246 ]

My Lords, being of opinion that the Master of the Rolls' judgment is right in the construction he put upon the terms "next of kin," it is unnecessary for me to consider any of the other points raised in the argument. The event having happened, in which it was by the settlement declared that the 10,000*l.* should be held upon trust for such person or persons as at the death of Emily Mangles should be her next of kin, the question is, who at that time answered that description, she having left a son and her father and her mother her surviving.

The first consideration is, what is the rule of the law of England in extending the proximity of kindred? for such rule must govern, unless superseded \*by what constitutes the second consideration ;

[ \*247 ]

(1) *Mr. Geldart* was on the same side.

which is, Have the words used received a conventional or technical construction? for if they have, such must be considered as the sense in which they have been used.

WITHY  
v.  
MANGLES.

As to the first of these questions, there really is no doubt; all writers agree that in extending proximity of kindred, the law of England considers the ascending and descending lines as equal. Blackstone, in the passage, quoted for another purpose by the appellant, says, “both,”—that is, the children and the parent,—“are in the first degree (1).” If, then, the law of England considers the child and the parent of a person deceased as equal in degree of proximity, nothing can prevent their taking equally under a limitation to “next of kin,” but such words having received some construction and technical meaning different from and controlling this their obvious and natural meaning. The point to be established by the appellant is, that “next of kin” has been construed to describe one nearest in proximity in the descending line, to the exclusion of all in the ascending line, though equal or nearer in degree of proximity. In support of this proposition it was first urged, that in the succession to property the descending line is preferred to the ascending; but unless this preference be founded upon the supposition that the party preferred is nearer of kin, it proves nothing. The passage in Blackstone, before referred to and relied upon by the appellant, shows that in his opinion proximity of kindred was not the ground of the preference. He says, “Both indeed are in the first degree, but with us the children are allowed the preference;” that is, they are preferred \*in grants of administration, though not nearer of kin than the parents of the deceased; from which it follows, that the right of the child, in preference, to grants of administration, has no bearing upon the construction to be put on the words “next of kin.”

[ \*248 ]

The statute 21 Hen. VIII. c. 5, proves the same thing; for it gives to the Ordinary the power of selecting, amongst persons in equal degree of kindred, to whom administration should be granted. How then can the granting of administration, in pursuance of this power, to the child in preference of the parent of the deceased, prove that the child is considered as being nearer in degree of kindred? It is an established rule of the Ecclesiastical Court that the right to the administration of the effects of an intestate follows the right of the property in them: *In re Gill* (2); to the exclusion even of next of kin, notwithstanding the express provisions of the

(1) 2 Bl. Comm. p. 504.

(2) 1 Hagg. 342.

WITHY  
v.  
MANGLES.

statute of Henry VIII. ; as in *Bridges v. The Duke of Newcastle*, before the Delegates in 1712, and cited in *West v. Wilby* (1), *Young v. Peirce* (2). How then can the right of the child, who is entitled to the property of the deceased, to have administration granted to him in preference to the parent of the deceased, who is not so entitled, prove that the child is considered as nearest of kin ?

[ \*249 ]

It was then argued that the term "next of kin" had, by usage, acquired a meaning in which it must be supposed to have been used in the settlement; and that such meaning was, "those who, as next of kin, were entitled to the succession to personalty." The Statute of Distributions accurately preserves the distinction between "next of kin," and those to whom \*it directs the distribution of the personalty. If there be no children, it directs the distribution of the estate equally to every of the next of kindred of the intestate, who are in equal degree, and those who legally represent them; and then confines the representation within brothers' or sisters' children; not treating the rights of those who take by representation as belonging to them as next of kin, but as derived from others, who, if they had lived, would have been next of kin. If the familiar expression, "next of kin under the statute," be considered as having reference to this provision of the statute, it will not be found to be so inaccurate as has been supposed. The question, however, is not whether "next of kin under the statute" has not been inaccurately used as describing those who are entitled under the statute, but whether the term "next of kin," without any reference to the statute, has received any such judicial construction. A short examination of the cases will show that the contrary is established by a very great preponderance of authority.

[His Lordship here referred to a long series of cases upon this point, concluding with *Elmsley v. Young* (3), in which a decision of Sir JOHN LEACH was overruled, and the judgment proceeded as follows:]

[ 251 ]

With the exception therefore of the opinion of Sir J. LEACH, which was so overruled, there has been an uniform course of decisions and of opinions expressed for upwards of fifty years, in opposition to the doctrine of Mr. Justice BULLER, in *Phillips v. Garth* (4); but these decisions and opinions are not only decisive as to the weight of authority, but they displace the only ground upon which the contrary doctrine could be supported.

(1) 3 Phillimore, 381.

(2) 1 Freem. 496.

(3) 2 My. & K. 780 : see 39 R. R. 353.

(4) 3 Br. C. C. 64.

WITHY  
 MANGLES.  
 [ \*252 ]

The appellant can only succeed by showing that the term "next of kin" had, by a technical and conventional construction, obtained the meaning of "those \*who would be entitled, in case of intestacy, under the Statute of Distributions." That is a question of fact; and had it been so used, all the Judges whose opinions have been referred to as objecting to the doctrine of Mr. Justice BULLER in *Phillips v. Garth*, since the year 1790, have been ignorant of the fact, and have held that the words had not obtained any such construction. I find no trace of any such construction having been adopted, except by Lord KENYON in *Stamp v. Cooke*, in 1786, and by Mr. Justice BULLER in *Phillips v. Garth*, in 1790, which was in the same year repudiated by Lord THURLOW. To give such a construction to the words would be, under the term "next of kin," to include persons not of kin at all, as husbands and wives; and under the word "next," to include persons comparatively remote, with those nearest of kin.

It is some satisfaction to be able to trace the origin of Mr. Justice BULLER's opinion, because it tends to diminish the weight which would otherwise attach to any decision of his: he says (1), "I cannot distinguish this case (*Phillips v. Garth*) from that of *Thomas v. Hole* (2); that case is in point, except that there the word is 'relations,' which being to be construed next of kin, makes it this case." The principle of that case, and of the many others which have followed it, had no application to that of *Phillips v. Garth*. The term "relations" *per se* is too general; all mankind are in a sense related, and it is impossible in any case to say where relationship terminates. If therefore the Court had not put some restrictions upon the generality of the term, all such gifts must have failed; and that, Lord KING, in *Thomas v. Hole*, states to be the reason of his decision. To prevent this failure of \*the testator's intention, the Courts construed the term "relations" to mean such relations as would take under the Statute of Distributions. In doing this, though a qualification was added to the expression, no violence was done to it, for all who could take under the statute would be relations, except husbands and wives, and they were excluded; whereas in the term "next of kin" there is no uncertainty, and no objection from its being too general; and the rule of the statute cannot be adopted without doing violence to the description, proximity not being exclusively the qualification under the statute. Not only is the distinction between "relations" or

[ \*253 ]

(1) 3 Br. C. C. 69.

(2) Cas. temp. Talbot, p. 251.



WITHY  
v.  
MANGLES.

“near relations,” and “next of kin,” obvious, but in *Marsh v. Marsh* (1), which was before *Phillips v. Garth*, under a gift to nearest relations, a sister was held entitled, to the exclusion of nephews and nieces; and this was followed by Sir W. GRANT, in *Smith v. Campbell* (2).

A testator may indeed so express himself, as to intimate an intention that the rule of the statute should prevail; as in *Stamp v. Cooke*. So in *Lowndes v. Stone* (3), a gift of the residue of estate and effects to next of kin or heir-at-law, was held to include nephews with an uncle, the words implying heirship according to the nature of the property; and in *Garrick v. Lord Camden* (4), Lord ELDON intimated an opinion that the same construction would be put upon a gift of residue “to be divided among my next of kin, as if I had died intestate,” which could only be effected by adopting the rule of the statute.

[ \*254 ]

I think that the appellant has wholly failed in proving that the term next of kin, used *simpliciter*, has by a technical or conventional construction obtained “the meaning of “those who would be entitled, in case of intestacy, under the Statute of Distributions:” and I am, therefore, of opinion that these words must be construed in their natural and obvious meaning, of nearest in proximity of blood; and being of that opinion, I think that this appeal ought to be dismissed, with costs.

LORD CAMPBELL:

I own that I have entertained very considerable doubts in this case; and now, although I shall concur in the judgment which has been pronounced by my noble and learned friend, I do so with considerable reluctance. It seems to me that we are driven to put a construction upon the terms of this settlement, which could not by possibility have entered into the contemplation of the parties, or the gentleman who framed it. I do not think that there was any notion that, there being a child, the father or mother should share in the money that was settled: and according to this doctrine, which I think upon the whole we are now bound to follow, still more preposterous consequences might follow; because there might have been grandchildren, who would have had no share, who would have been entirely destitute, and the grandfather and grandmother would have taken the whole.

(1) 1 Br. C. C. 293.

(3) 4 R. R. 316 (4 Ves. 649).

(2) 13 R. R. 224, 226 (Coop. 275; 19 Ves. 400, 404).

(4) 9 R. R. 297 (14 Ves. 385).

I own that I should have been very glad to have found that the term "next of kin" had received a legal signification, and that it might be considered as tantamount to "heir" in immovables. There is some ground for that contention, I think; because it is allowed, that upon a reference to the Master to inquire into the next of kin, he looks to see who would share according to the Statute of Distributions; and the construction put upon the statute of \*Henry VIII., I own has had some influence upon my mind; because by that it is enacted, that the administration is to be granted to the wife of the testator, or to the next of kin, or to both. Now under the expression "next of kin," it has been always held that the child is entitled *de jure* to administration, in preference to the father and mother. The Court of Queen's Bench would issue a *mandamus* to the Ecclesiastical Court to grant administration to the son; that is explained by saying that administration follows the property. I own that that weakens the argument, but still it has considerable force in my mind.

WITHY  
v.  
MANGLES.

[ \*255 ]

When I look to the authorities, I think that, till we come to *Elmsley v. Young*, they were rather more equally balanced than strikes the more experienced mind of my noble and learned friend; because till then you had Mr. Justice BULLER, Lord KENYON, and Sir JOHN LEACH, all Judges of very great experience, and entitled to very great respect, clearly intimating the opinion that "next of kin" was to be construed with reference to the Statute of Distributions. Then the doubt thrown upon *Phillips v. Garth*, might, to a certain degree, be explained by a mistake, into which Mr. Justice BULLER fell, in saying that the parties in that case were to take *per capita*, instead of *per stirpes*. However, on the other side there are those very high authorities, Lord ELDON, and the other learned Judges, Lord THURLOW, Sir W. GRANT, and Sir T. PLUMER, who must be taken to have questioned *Phillips v. Garth*, not only upon the ground of that mistake, but likewise upon the general principle upon which it is founded; because I think the words "nearest" and "next of kin" are essentially the same. If I had had to decide *Elmsley v. Young*, I certainly should have hesitated a good deal before \*I came to the decision that was pronounced by those very learned Judges, the then Lords Commissioners of the Great Seal. But, however, it seems to me that the law must be taken as settled by that decision. That case was very deliberately considered; the judgment was pronounced by very learned Judges, and it has the very high sanction of my noble and learned friend, who was then

[ \*256 ]

WITHY  
r.  
MANGLES.

one of the Lords Commissioners. Under these circumstances, we cannot reverse this decision of the MASTER OF THE ROLLS without upsetting *Elmsley v. Young*, which it is quite clear that we cannot do. I think that the decision in *Elmsley v. Young* must be considered as having finally settled this controverted question, and to that decision I feel that I am bound to adhere; but I do it with great reluctance. It is impossible to deny that the law has, by some bad luck, got into a strange state, and that now, unless great caution is observed in framing deeds, very calamitous consequences will take place; and that upon deeds already drawn, where merely the words "next of kin" occur, without any other words to specially point out the meaning, the intention of parties may be disappointed. But upon the whole it seems to me that greater mischief would ensue from shaking or overturning that case of *Elmsley v. Young*, than by adhering to it. Therefore I concur in the judgment which has been proposed by my noble and learned friend, in adhering to *Elmsley v. Young*, by which we affirm the decree of the MASTER OF THE ROLLS in this case.

(It was then ordered that the appeal be dismissed, and the decree affirmed; and that the appellant do pay to the respondents the costs incurred by them in the appeal.)



### DRAKE v. ATTORNEY-GENERAL.

(10 Clark & Finnelly, 257—288.)

1843.  
July 7, 10.

[ 257 ]

Probate duty and legacy duty.

[THIS was an appeal from an order of the MASTER OF THE ROLLS in a case reported *ante*, 52 R. R. 122 (3 Beav. 257), under the name of *Platt v. Routh*. The judgment of the House of Lords affirming the decision of the MASTER OF THE ROLLS is very short, and will be found at the end of the report of the case at the Rolls Court, see 52 R. R. at p. 131.]

SIR FRANCIS BURDETT, BART., AND OTHERS *v.* DOE D.  
REV. FRANCIS WARD SPILSBURY AND ANOTHER (1).

(10 Clark & Fennelly, 340—418.)

Power, Execution of—Attestation.

Lands were limited to such uses, &c. as L. H. W. should appoint by her last will and testament, in writing, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses. L. H. W. signed and sealed an instrument (before the Wills Act, 1 Vict. c. 26) containing an appointment commencing thus: "I, L. H. W., do publish and declare this to be my last will and testament;" and ending thus: "I declare this only to be my last will and testament: In witness whereof I have, to this my last will and testament, set my hand and seal, the 12th day of September," &c. The attestation was thus: "Witness, C. B., E. B., A. B."

Held by the House of Lords (reversing a judgment of the Court of Exchequer Chamber, and concurring in the opinion of the majority of the Judges), that the attestation was sufficient, and that the power was well executed.

THIS was an action of ejectment brought in the Court of King's Bench, by the defendant in error against the plaintiffs in error, to recover possession of lands in Derbyshire. The cause was tried at the Derbyshire Spring Assizes in 1834, and a verdict was found for the defendant in error, subject to the opinion of the Court of King's Bench upon a special case, with liberty to either party to turn the same into a special verdict. The special case was argued in the King's Bench, and the unanimous judgment of that Court was for the plaintiffs in error (2). The defendant \*in error thereupon turned the special case into a special verdict, which, among other things not material to be here mentioned, stated that by indentures of settlement, dated the 4th and 5th December, 1787, and made on the marriage of Lydia Henning Ward with William Augustus Skynner, certain of the lands in question, of which L. H. Ward was seised in fee simple, were limited after her decease, and in default of issue of the marriage, "to the use of such person or persons, for such estate and estates, upon such trusts, and to and for such ends, intents and purposes, as she the said L. H. Ward, whether covert or sole, and notwithstanding her then intended or any future coverture, by her last will and testament, in writing, or by any writing purporting to be, or in the nature of, her last will and testament, or by any codicil or codicils thereto, to be by her signed, sealed, and published in the presence of, and attested by, three

1842,  
May 11, 12,  
20.  
June 14.  
1843.  
June 19.  
Aug. 18.

Lord  
LYNDHURST,  
L.C.  
Lord  
CAMPBELL.  
Lord  
BROUGHAM.  
[ 340 ]

[ \*341 ]

(1) *Vincent v. Bishop of Sodor and Man* (1850—1), 5 Ex. 683, 4 De G. & Sm. 294, 20 L. J. Ch. 433; *Adkins* (1872) L. R. 14 Eq. 402, 41 L. J. Ch. 628, 27 L. T. 90.  
(2) 4 Ad. & El. 1; 6 Nev. & Man. 259.

BURDETT  
 E.  
 SPILSBURY.

or more credible witnesses, should give, devise, direct, limit, or appoint; and for want of such gift, &c. to the use of the said L. H. Ward, her heirs and assigns for ever:" That the said marriage between L. H. Ward and W. A. Skynner was duly solemnized the 6th of December, 1787: That the said L. H. Ward or Skynner died the 30th September, 1789, in the lifetime of her said husband, without leaving any issue of the marriage, but leaving Benjamin Ward her uncle and heir-at-law surviving, and also leaving an instrument in writing, which was partly as follows:

[ \*342 ]

"I, Lydia Henning Skynner, wife of W. A. Skynner, Esq. of, &c. do publish and declare this to be my last will and testament. I appoint my beloved husband W. A. Skynner my executor, and my beloved mother, Lydia Ward, executrix with him. I give to my beloved mother for her natural life, the rents, &c. of the messuage, \*&c. and hereditaments at Etwall, &c. in the county of Derby, and after her death to go to my beloved husband W. A. Skynner, his heirs, &c. for ever." The instrument, after disposing of certain stocks, proceeded thus: "And as to all the rest and residue of my estates, real and personal, whatsoever and wheresoever, &c., I give, devise, and bequeath the same, and every part and parcel thereof, unto my beloved husband W. A. Skynner, his heirs, executors, administrators and assigns, absolutely for ever, &c. I declare this only to be my last will and testament: In witness whereof I have, to this my last will and testament, contained in one sheet, set my hand and seal, the 12th day of September, in the year of our Lord 1789."

"LYDIA HENNING SKYNNER (L. S.).

"Witness:

"CHARLES BALL,

"ELIZ. BALL,

"ANN BALL."

(The instrument did not at all refer to the power of appointment.)

By the special verdict it was further found that the said instrument in writing, purporting to be the last will and testament of the said L. H. Skynner, was signed, sealed, and published by her in the presence of the said C. Ball, E. Ball, and A. Ball, and attested by them, and their attestation was in manner and form as appears on the said instrument: That the said B. Ward, the uncle and heir-at-law of the said L. H. Skynner, also departed this life in August, 1790, having by his will devised his estates, real and

personal, to his nephew Benjamin Spilsbury, since deceased, of whom Francis Ward Spilsbury, one of the lessors of the defendant in error, is the eldest son \*and heir-at-law, and the other lessor of the defendant in error is now the heir-at-law of the said L. H. Skynner: That the said W. A. Skynner departed this life in February, 1833; and the plaintiffs in error claim title under him.

BURDETT  
v.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.  
[ \*343 ]

The judgment of the Court of King's Bench having been entered on this verdict, a writ of error was brought thereon in the Exchequer Chamber, where the same was argued in 1837; and the judgment of the King's Bench was reversed in 1839, by a majority of four to three Judges (1).

The present writ of error was brought to reverse that judgment. Another writ of error was brought at the same time, to reverse a like judgment, in an ejectment brought by the same defendant in error, on demise of the same persons, to recover other lands comprised in the same marriage settlement, and appointed by the said instrument, by L. H. Ward.

The only question in both cases—which came to be argued together—was, whether the said instrument was so executed and attested as to satisfy the terms of the power reserved to L. H. Ward in the settlement. The Common Law Judges (hereinafter mentioned) were present at the arguments on the 11th, 12th, and 20th of May, and 19th of June, 1842.

*Mr. Pemberton* and the *Solicitor-General*, for the plaintiffs in error in both cases, argued generally that the conditions and forms prescribed for the exercise \*of the power given by the marriage settlement were duly complied with, by the executing and attesting of the will of the donee of the power in the manner found by the special verdict; for that Lydia Henning Skynner signed, sealed, and published her last will and testament in the presence of three credible witnesses; and all that appeared on the face of the instrument itself.

[ \*344 ]

The *Attorney-General* and *Mr. Bethell*, for the defendants in error, contended that the power authorizing Mrs. Skynner to dispose of the property by her will, required not only that it should be signed, sealed, and published in the presence of three witnesses or more, but also that the several facts of signing, sealing, and publishing of it should be attested by the witnesses; and there was no attestation or due publication of the instrument in question.

BURDETT      The following cases were cited and commented on: *Hands v. James* (1), *Croft v. Pawlet* (2), *Brice v. Smith* (3), *M'Queen v. SPILSBURY*. *Farquhar* (4), *Wright v. Wakeford* (5), *Doe v. Peach* (6), *Wright SKYNNER* *v. Barlow* (7), *Doe v. Pearce* (8), *Moodie v. Reid* (9), *Stanhope v. SPILSBURY*. *Keir* (10), *Buller v. Burt* (11), *Ward v. Swift* (12), *Hougham v. Sandys* (13), *Simeon v. Simeon* (14), *Lempriere v. Valpy* (15), *Curteis v. Kenrick* (16), *Mackinley v. Sison* (17), *Brook v. Wilson* (18), *Waterman v. Smith* (19), *Allen v. Bradshaw* (20).

[ 345 ]      All these cases will be found again cited and their application explained, in the subjoined opinions of the learned Judges.

At the close of the arguments, the following question was put to the learned Judges: "Was the power given to the testatrix, Lydia Henning Ward, by the settlement of the 4th and 5th days of December, 1787, set forth in the special verdict, duly and effectually executed by her will, dated 12th of December, 1789, as stated in the said verdict?"

The Judges desiring time to consider the question, the further consideration of the causes was postponed.

June 19.      The Judges again attended on the 19th of June, 1843, to deliver their answers to the above question; and the LORD CHANCELLOR having acquainted the House that they differed in their opinions, it was ordered that they deliver their opinions *seriatim*, with their reasons.

\*         \*         \*         \*         \*

[The question raised in this case being of little practical importance since the Wills Act, 1837 (1 Vict. c. 26, s. 10), it is not thought necessary to reprint the opinions of the Judges, which are given at great length in the original report.]

Aug. 18.      THE LORD CHANCELLOR :

[ 408 ]      The question in these cases is, whether the will of Mrs. Skynner was a good execution of the power contained in her marriage settle-

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| (1) Comyns' Rep. 531.                         | (11) Cited in 4 Ad. & El. 15; 6 Nev. & Man. 281, n. |
| (2) Strange, 1109.                            | (12) 3 Tyr. 122; 1 Cr. & M. 171.                    |
| (3) Willes' Rep. 1.                           | (13) 2 Sim. 95.                                     |
| (4) 8 R. R. 212 (11 Ves. 467).                | (14) 4 Sim. 555.                                    |
| (5) 17 Ves. 454; 4 Taunt. 213.                | (15) 5 Sim. 108.                                    |
| (6) 15 R. R. 361 (2 M. & S. 576).             | (16) 3 M. & W. 461.                                 |
| (7) 16 R. R. 339 (3 M. & S. 512).             | (17) 42 R. R. 240 (8 Sim. 561).                     |
| (8) 16 R. R. 634 (6 Taunt. 402).              | (18) 55 R. R. 699 (6 M. & W. 473).                  |
| (9) 16 R. R. 257 (1 Madd. 516; 7 Taunt. 355.) | (19) 9 Sim. 629.                                    |
| (10) 2 Sim. & St. 37.                         | (20) 1 Curt. Ecc. Rep. 110.                         |

ment. The power required that the will should be signed, sealed, and published by her, in the presence of and attested by three or more credible witnesses. The will is set out in the special verdict, and it is found to have been signed, sealed, and published by her in the presence of the three witnesses named therein, and attested by them, and that their attestations are in manner and form as stated in the said instrument. The will concludes thus: "I declare this only to be my last will and testament. In witness whereof I have to this my last will and testament, contained in one sheet, set my hand and seal the 12th day of September." Then follows the signature of the testatrix at the bottom of the page; and on the top of the following page it goes on thus: "In the year of our Lord 1789." The signature is then repeated; and on the side, in the usual place where witnesses sign, is the word "witness," and the names of the three witnesses are subscribed thereto.

BURDETT  
v.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.

If this question were entirely new, I think your Lordships would have felt very little difficulty in deciding it. The will is to be signed, sealed, and published in the presence of and attested by three credible \*witnesses. It was in fact signed, sealed, and published in the presence of the witnesses; it is so found by the special verdict; and they subscribed their names to it, attesting it as witnesses. I think if this had come before your Lordships unaffected by previous decisions, you would have been disposed to consider this a sufficient execution of the power; and the more so, as under the Statute of Frauds, which requires that all devises shall be in writing, and signed by the testator, and shall be attested and subscribed in the presence of the devisor by three or more credible witnesses, it has been held that an attestation containing only the words "sealed and delivered by," &c. (omitting the word "signed"), is a sufficient compliance with the statute.

[ \*409 ]

But it is contended that the question is controlled by previous decisions, and it becomes necessary therefore to consider how far they apply to and govern this case. The first and leading authority, and upon which in fact all the others depend, is that of *Wright v. Wakeford* (1). In that case the power was to be executed by the donees, testified by any writing under their hands and seals, attested by two or more credible witnesses. The attestation contained the words "sealed and delivered," and nothing more: only two of the requisites were attested; the signing was omitted. It was contended that the word "sealed" implied that the parties



BURDETT  
\*  
SPILSBURY.  
SKYNNER  
\*  
SPILSBURY.

[ \*410 ]

who put their seals, also put their hands to the instrument: but the majority of the Judges were of opinion that it did not so imply, according to the true interpretation of the word "sealed." This decision turned, therefore, entirely upon the construction of the clause of attestation; and undoubtedly, if two of the requisites were inserted, and the third omitted, \*the attestation could not be correct: the signature of the witnesses to the memorandum was an attestation to the sealing and delivery only. The cases of *Doe v. Peach* (1), *Wright v. Barlow* (2), and *Doe v. Pearce* (3), were decided entirely on the authority of *Wright v. Wakeford*, and do not appear to me to carry the rule further.

Notwithstanding the doubts which have been entertained as to the propriety of the decision in *Wright v. Wakeford*, and the repeated expressions of regret by very learned Judges that that case had been so decided, still as it has been so frequently acted upon, and for so long a period, I should have felt it my duty, if this case had not been distinguishable from it, to recommend to your Lordships to adhere to that decision, and pronounce the execution of the power in the present instance to be insufficient. Certainty as to the rules affecting property and its disposition, is of far more consequence than the consideration of what the rules should be; because the transactions of mankind are regulated accordingly. But the question here is not, as in *Wright v. Wakeford*, whether a memorandum of attestation, mentioning some of the requisites and omitting others, is valid; but whether the general memorandum is in this case sufficient. And first, it is worthy of observation, that the language of the power and the grammatical construction of it, are not the same in this case as in *Wright v. Wakeford*. There the power was to be executed by any writing under the hands and seals of the donees, attested, &c. The writing under hand and seal, which may be considered as a description of the completed instrument, was to be attested. But in this case the power is to be executed by a writing, to be by the donee signed, sealed, and published in the presence \*of and attested by three or more witnesses. The word "attested," in grammatical construction, relates only to the word "writing;" not, as in the case of *Wright v. Wakeford*, to the whole description, viz. under hand and seal. It would not therefore, I think, necessarily follow, that because the insertion of the words "sealed and delivered" in the memorandum

[ \*411 ]

(1) 15 R. R. 361 (2 M. & S. 576).  
(2) 16 R. R. 339 (3 M. & S. 512).

(3) 16 R. R. 634 (6 Taunt. 402).

of attestation might be considered requisites in the former case, it would also be necessary in the present. In *Doe v. Peach*, and *Wright v. Barlow*, the words are the same as in *Wright v. Wakeford*. Independently, however, of this distinction, and without relying upon it, there is no case which has decided that a general attestation is not sufficient; and I see no reason why, if there be a general attestation, and the witnesses prove that all was done that was required to be done, such a general attestation should not be sufficient. In this case the attestation follows immediately after the *testimonium* clause, and may, I think, be considered as referring to and connected with it.

BURDETT  
v.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.

In *Moodie v. Reid* (1), the testatrix concluded her will thus: "These my last bequests, signed by me this 4th day of Feb. 1812; SARAH MOODIE. Witness, B. H., J. H." Chief Justice GIBBS in that case said, "Here the witnesses have clearly attested the signing." But the attestation was general, and they could have only been considered as attesting the signing by connecting the attestation with the words that immediately preceded it, "These my last bequests, signed by me."

Again, in the case of *Stanhope v. Keir* (2), before Sir J. Leach, the will concluded thus: "This is my last will and testament, made and signed," &c.; it was signed by the testatrix, Eugenia Keir. The attestation was as follows, "In the presence of;" then \*followed the names of the witnesses. The VICE-CHANCELLOR considered this a sufficient attestation of the signing, which could only be by reference to the *testimonium* clause.

[ \*412 ]

The case of *Buller v. Burt* (3), before the same Judge, when Master of the Rolls, is to the like effect. In that case the deed concluded as follows: "Signed and sealed, &c. by L. Smith" (the signature of the grantor): "Witness;" then followed the names of the witnesses. The MASTER OF THE ROLLS said, that "as the general word 'witness' can affirm no more than the deed states, there is in this case no attestation of that essential part of what is required for the due execution of the power, the delivery of the deed; the power therefore is not well executed." In a former part of his judgment he speaks of the "body of the deed;" but it is obvious, I think, that he means the *testimonium* clause. In using the terms "body of the deed," he uses them as distinguished from

(1) 16 R. B. 257 (1 Madd. 516; 7 Taunt. 355). (3) 6 Nev. & Man. 281, n.; see also 4 Ad. & El. 15.

(2) 2 Sim. & St. 37.

BURDETT the attestation. In this, therefore, as in the former case, he  
 v.  
 SPILSBURY. seems to have considered a reference to the *testimonium* clause  
 SKYNNER legitimate.

v.  
 SPILSBURY. In the present case, the reference would embrace all the requisites  
 for the due execution of the power, and render it complete. These  
 considerations lead me to the conclusion, that the power was  
 properly executed, and I recommend your Lordships therefore to  
 reverse the judgment of the Exchequer Chamber; the effect of  
 which will be to affirm the judgment of the Court of Queen's  
 Bench: and in following this recommendation, your Lordships will  
 conform to the opinions of the Chief Justice of the Common Pleas  
 and the majority of the Judges, who were consulted by your  
 Lordships upon the occasion.

[ 413 ] LORD BROUGHAM:

I entirely agree in the course recommended by my noble and  
 learned friend. If this case had been—and this we all of us  
 felt during the whole of the arguments—if this case had been in  
 terms the same as, and was not distinguishable by any material  
 difference from, the case of *Wright v. Wakeford*, followed by the  
 two other cases of *Doe v. Peach*, and *Wright v. Barlow*, which were  
 in terms the same with *Wright v. Wakeford*, as regarded the  
 material parts of the power and the facts of the execution; in that  
 case even we should have been very reluctant to have run counter  
 to that authority, and for the reason assigned by my noble and  
 learned friend. I hardly know a case which has excited, at  
 different times, more remark than the case of *Wright v. Wakeford*.  
 It has been again and again questioned and criticised by the  
 learned Judges; it cannot therefore be said to have been at any  
 time a case that commanded anything like the entire concurrence  
 of Westminster Hall. Nevertheless, for the reasons assigned—  
 judicially and soundly assigned—by my noble and learned friend,  
 I should have been the last to recommend a departure from that  
 case, overruling it and adopting the contrary principle of decision;  
 because it is perfectly true, as was stated by my noble and learned  
 friend, that in this as in all other cases, where a decision has been  
 held to make the law; where it has been acted upon as that  
 decision has been in other cases, two of which particularly have  
 been mentioned by my noble and learned friend; where it has  
 been acted upon by professional men, has been assumed by them  
 to be the law, and has obtained the faith of parties, and has

regulated the transactions of men upon most material points affecting their most important interests, it is of the highest possible importance, and even of absolute necessity, that the Court should not, without a very strong reason indeed to induce them so to do, depart from that rule; it being of very much more importance, in nine cases out of ten, that the law should be known and fixed which is to regulate the advice of professional men, and to govern the transactions of their clients, than that perhaps the best possible rule of law should in each case be adopted. But here differences have been pointed out by my noble and learned friend, and dwelt upon by a considerable majority of the Judges, whose valuable assistance we had in disposing of this question; and there is, no doubt, a perfectly sufficient difference in this case to justify us in reversing the decision of the Exchequer Chamber, and setting up the decision of the Court of Queen's Bench, and agreeing therefore with the majority of the learned Judges.

BURDETT  
v.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.  
[ \*414 ]

I shall not enter further into this case than to say that I certainly have felt, in the consideration I have been able to bestow upon it, that there is a manifest connexion here between the attestation itself and the *testimonium* clause. This is the ground chiefly upon which I have formed my opinion upon this case; and the more I have considered it after hearing it so very ably argued at the Bar, the better I am satisfied with having come to that conclusion. I therefore, without troubling your Lordships at greater length, will merely state that I entirely agree with the reasoning of my noble and learned friend and of the majority of the learned Judges, in coming to the conclusion of a reversal, for those reasons which have led my noble and learned friend to that result.

LORD CAMPBELL:

[ 415 ]

It gives me great satisfaction in this case to agree in opinion with the majority of the learned Judges. When your Lordships consult the Queen's Judges, I do not at all consider that you are bound by the opinion of the majority, or even by their unanimous opinion, unless you are perfectly satisfied with the reasons which they assign for the opinion they give. But it is always a very painful thing to differ from those venerable magistrates, who are always to be looked up to with so much reverence and respect.

In this case the only question is, whether the will was attested by three credible witnesses. It is not at all disputed, indeed it is

BURDETT  
 v.  
 SPILSBURY.  
 SKYNNER  
 v.  
 SPILSBURY.

found by the special verdict, that it was signed, sealed, and published in the presence of the witnesses. The question is, whether it has been attested by them. The witnesses saw all these solemnities performed, and they signed their names to the will as attesting witnesses. The question is, Is not that will attested by them? Independently of authority, I cannot doubt that for a moment. The only objection that can be made is this; that the will upon the face of it does not contain any *proces verbal*, or history of the transaction. Well, but the power imposes no such condition; it does not say, “a will signed, sealed, and published in the presence of three witnesses, and attested by them, and a will containing a history of the solemnity.” There are no such words in the power, and I know not how such a condition is to be added to the power which the donor has given.

[ \*416 ]

Then, my Lords, I am very glad to think that there is no authority in this case to prevent us from giving the natural construction which such a power ought to receive; a construction in analogy to the Statute of \*Frauds, respecting the execution of wills. The testator is the donor of the power; and unless the donee complies with the solemnities required by the donor, the power is not well executed. Now the Statute of Frauds, as your Lordships are aware, upon this subject is almost *ipsissimis verbis* the same with the power, the construction of which we are now considering; and it has been determined over and over again, that if a will is properly executed in the presence of witnesses, and they simply sign the will, that is a due execution of the power, and the will is good under the Statute of Frauds.

With regard to powers contained in private deeds, we have *Wright v. Wakeford*, and the class of cases which have succeeded that case. Now fortunately it is not necessary for this House to overturn those cases to-day, although, had they been brought by appeal before this House in proper time, I apprehend that the probability is that your Lordships would not have approved of them. But in those cases there is not a mere simple attestation by witnesses, that is, the subscription of their names, but there is an imperfect history of the transaction. There is a declaration by them that they saw certain solemnities performed which are required by the power, without having seen all; and that maxim of law has been, I think, misapplied, “the expression of one is the exclusion of the other;” and therefore this been supposed sufficient to negative the performance of any solemnity which is not

mentioned in the history of the transaction of the will. But there is no case, I am happy to think, in which there has been a simple signature by witnesses, the witnesses having seen all the solemnities duly performed, which has been held not to be a true execution of a power. If it were necessary, I think that \*the *testimonium* clause here might be resorted to, both upon principle and upon authority. I beg leave humbly to express my opinion, that without that *testimonium* clause, there would have been a good execution of the power; because here the will was signed, sealed and published in the presence of three credible witnesses, who signed that will as the attesting witnesses. I say that that was an attestation, and that this is a good execution of the power, without reference to the *testimonium* clause. The very common expression we have, of “attesting witness” to a deed, explains this. What is the meaning of an attesting witness to a deed? Why it is a witness who has seen the deed executed, and who signs it as a witness. He is a good attesting witness, although there should not be upon the deed itself, a memorandum saying that it is signed, sealed, and delivered in his presence. These are good attesting witnesses; and I apprehend that upon principle, and not contrary to authority, this will was attested in the presence of three credible witnesses, and that therefore it is a good execution of the power. The consequence is that the judgment of the Court of Exchequer Chamber will be reversed, and that of the Court of Queen’s Bench affirmed.

BURDETT  
v.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.  
[ \*417 ]

LORD BROUGHAM :

There is no authority for saying that a general attestation of an instrument in execution of a power, is insufficient.

THE LORD CHANCELLOR :

The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness.

In the case of *Skykker v. Spilsbury*, the judgment must be the same as in that of *Burdett v. Spilsbury*; \*the arguments at the Bar and the opinions of the learned Judges comprised both cases, both depending on the question whether the power was well executed.

[ \*418 ]

The following order was then made in each of the cases :

Ordered and adjudged, that the judgment given in the Court of Exchequer Chamber for the defendant in error, reversing a judgment

BURDETT  
c.  
SPILSBURY.  
SKYNNER  
v.  
SPILSBURY.

of the Court of Queen's Bench for the plaintiffs in error, be, and the same is hereby reversed. And it is further ordered and adjudged, that the original judgment of the Court of Queen's Bench be, and the same is hereby affirmed.

1842.  
June 14, 15.  
1843.  
June 19.  
Aug. 18.

MARGARET RUTLAND v. DOE D. THOMAS WYTHER  
AND MARY HIS WIFE.

(10 Clark & Fennelly, 419—470.)

Lord  
LYNDHURST,  
L.C.  
Lord  
BROUGHAM.  
Lord  
CAMPBELL.  
[ 419 ]

Devise—Leasing power, execution of.

A will devising real estate gave a power to the devisees for life to demise and lease the same for any term not exceeding 21 years in possession, "so as upon every such lease there should be reserved and made payable, during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease." The first devisee for life, in exercise of this power, made a lease for 21 years from the 11th of October, 1833, at the yearly rent of 903*l.*, payable by equal half-yearly payments, on the 6th of April and 11th of October in every year, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st of August next before the determination of the said term.

Held by the Lords (concurring in the opinions of a majority of the Judges, and reversing the judgment of the Exchequer Chamber) that the lease was a valid execution of the power.

[ \*420 ] An action of ejectment, brought in the Court of Exchequer by the nominal defendant in error, on the demise of Thomas Wythe and his wife, for the recovery of certain tenements in the county of Norfolk, against the plaintiff in error the tenant thereof, was tried at the Norfolk Summer Assizes in the year 1836, when a verdict was found for the defendant in error, subject to the opinion of the Court on a special case. That case was argued in the Court of Exchequer in 1837, and judgment was given for the plaintiff in error (1); whereupon the special case \*was turned into a special verdict, and the judgment being entered thereon, was brought by writ of error into the Exchequer Chamber, and there reversed (2). The present writ of error was brought to reverse the latter judgment.

The facts contained in the special verdict, material to be here stated, were as follows: Benoni Mallett, who died in 1783, seised of the tenements in question, by his will dated the 28th of January, 1780, and duly executed, devised the same to his grandson Philip Mallett Case, for life, with remainder to trustees to preserve contingent remainders; with remainders to the sons and daughters of the said P. M. Case, as in the will mentioned: and for default of

(1) 46 R. R. 741 (2 M. & W. 681).

(2) 5 M. & W. 688.

such issue, the said testator, by his said will, devised the said tenements to his grandson, Thomas Mallett Case, for life, with remainder to trustees to preserve contingent remainders; with remainders to the sons of the said T. M. Case successively in tail male; with remainder to his daughter and daughters as tenants in common in tail general, &c.

The will contained the following power of leasing: "Provided always, and his will was, that it should and might be lawful to and for his said grandson, Philip Mallett Case, and all his sons, and all other person or persons respectively, as and when they should respectively come into and be in the actual possession of the said tenements, with the appurtenances, or any part thereof, or be actually entitled to the rents and profits thereof, by indenture under their respective hands and seals, to demise and lease the same, or any part thereof, unto any person or persons, for any term or number of years, not exceeding 21 years \*in possession, and not in reversion, remainder, or expectancy; so as upon every such lease there should be reserved and made payable, during the continuance thereof respectively, the best improved yearly rent that could be reasonably had for the same, without taking any sum or sums of money by way of fine or income, for or in respect of such lease or leases; and so as none of the said lease or leases were made dispunishable of waste by any express words therein; and that in every such lease there should be contained a clause of re-entry for nonpayment of the rent or rents to be thereby respectively reserved; and so as such lessee or lessees, to whom such lease or leases should be made, sealed and delivered counterparts of such lease or leases."

On the testator's death Philip M. Case became, under the will, seised of the said tenements. Thomas M. Case died in 1800, leaving issue one child, Mary, one of the lessors of the plaintiff in the action; and who in the year 1810 intermarried with Thomas Wythe, the other lessor of the plaintiff.

By an indenture dated the 14th of December, 1833, under the hand and seal of the said P. M. Case, and made between him of the one part, and the said Margaret Rutland of the other part, he, P. M. Case, being in actual possession of the said tenements, and actually entitled to the rents and profits thereof, in exercise of the said power of leasing, demised unto the said Margaret Rutland, and her executors, administrators, and assigns, the said tenements, with the appurtenances; to have and to hold the same unto her and her executors, &c. from the 11th day of October then last, for and during

RUTLAND  
v.  
WYTHE.

[ \*421 ]



RUTLAND  
 v.  
 WYTHE.  
 [ \*422 ]

the term of 21 years then next ensuing ; yielding and paying therefor, unto the said P. M. Case and his assigns, during such \*part of the term of that demise as he should live, and after his decease unto such person or persons as for the time being should be entitled to the reversion of the said premises under the said will, the yearly rent of 90*8*l. by equal half-yearly payments, that is to say, on the 6th day of April, and the 11th day of October, in every year, in equal portions, except the last half-year's rent, which was thereby reserved and agreed to be paid on the 1st day of August next before the determination of the said term. And it was thereby provided, that if the said rent, or any part thereof, should be unpaid for 42 days next after any of the days whereon the same was reserved to be paid, or if the said Margaret Rutland, her executors, &c., should not perform the covenants therein contained, then in either of the said cases it should be lawful for the said P. M. Case or his assigns, during his life, and after his decease for such person or persons as aforesaid, into the said demised premises, or any part thereof in the name of the whole, to enter, &c.

P. M. Case died without issue in July, 1834, whereupon Mrs. Wythe became entitled to the said tenements as tenant in tail general under Benoni Mallett's will ; and she, and her husband in her right, sought by the said action to set aside the said lease, as not being in pursuance of the power of leasing contained in the said will.

The only question before the House was, whether so much of the lease as reserved payment of the last half-year's rent on the 1st of August, instead of the 11th of October, the last day of the term, was consistent with the leasing power. That question was argued on the 14th and 15th of June, 1842, in the presence of the learned Judges.

[ \*423 ]

The *Solicitor-General* and *Mr. R. V. Richards* for \*the plaintiff in error, contended, generally, that the lease was a valid execution of the power, that the judgment of the Court of Exchequer Chamber was erroneous, and that the judgment of the Court of Exchequer was right.

*Mr. Pemberton* and *Mr. Biggs Andrews*, *contra*, argued that the power was not well executed by the said lease, on account of the reservation of the last half-year's rent, whereby no rent was made payable from the 1st of August to the 11th of October in the last

year of the term; whereas, as they submitted, the rent ought to have been reserved equally during the whole term, and so that each person entitled to the reversion of the demised premises would receive the rent to accrue during the period for which such person should be entitled.

RUTLAND  
v.  
WYTHE.

At the close of the arguments the following question was proposed to the learned Judges: "Whether the indenture of lease between P. M. Case and Margaret Rutland, dated the 14th of December, 1833, as stated in the special verdict, is a valid execution of the power of leasing, as also stated in the special verdict, given by the will of B. Mallett, dated 28th January, 1780?"

The Judges desiring time to answer the question, the further consideration of the cause was postponed.

\* \* \* \* \*

#### THE LORD CHANCELLOR:

*Aug. 18.*

[ 466 ]

The question in this case is, whether the lease, as stated in the special verdict, was a valid execution of the leasing power given by the will of Benoni Mallett. It was one of the restrictions upon the power, that upon every lease there should be reserved and made payable during the continuance thereof, the best improved yearly rent that could be reasonably had for the same, without taking any sum of money by way of fine or income for or in respect of such lease. The lease was made on the 14th of December, 1833, for 21 years from the 11th of October preceding, at the yearly rent of 903*l.*, payable by equal half-yearly payments, viz. on the 6th of April and the 11th of October, in every year, \*in equal portions, except the last half-year's rent which was thereby reserved and agreed to be paid on the 1st of August next before the end of the term. It is admitted that the power was well executed, if the last half-year's rent might, consistently with the restrictions on the power, be made payable on the 1st of August.

[ \*467 ]

The power requires a yearly rent to be reserved. It is clear that, under and consistently with this power, which says nothing as to the time of payment, the yearly rent might have been reserved and made payable yearly, half-yearly, or quarterly; and I agree with what was said by one of the learned Judges, that it follows as a consequence that a yearly rent means a rent payable within each year, not payable merely at the end of the year; and the reservation therefore, in the last year, of the rent on the 1st of August, if

RUTLAND  
v.  
WYTHE.

made *bonâ fide*, which is not controverted in the present instance, was within and a due execution of the power. But it has been contended, that as the yearly rent was to be reserved and made payable during the continuance of the term, and as the last payment was, by the provision in the lease, to be made on the 1st of August, upwards of two months before its expiration, it was not payable during the continuance, that is, the whole continuance of the lease, and so was at variance with the power. But this depends upon what is meant by a yearly rent reserved and made payable during the continuance of the lease. These words, I think, obviously import nothing more than this, that in every year, as long as the lease shall endure, a yearly rent shall be reserved and made payable. If this be the true interpretation of the power, it is clear there has been no infringement of the restriction. The evident motive for fixing \*upon a day for payment before the last day of the term, was to ensure the right of distress for the benefit of the person, whoever he might be, that should at that period be entitled to the rent.

[ \*468 ]

The opinion of Justice POWELL, in *Regina v. Weston*, though mentioned merely by way of illustration, and in which Chief Justice HOLT concurred, is entitled to much attention. It is expressly in point, and coincides with the view I have taken of this question. On these grounds, therefore, I recommend to your Lordships to reverse the judgment of the Court of Exchequer Chamber.

LORD BROUGHAM :

In this case I had not an opportunity of doing more than considering the opinions of the learned Judges, with the majority of whom, as at present advised, I concur ; but not having heard the whole of the arguments, having been obliged to be at the Judicial Committee of the Privy Council, I shall do no more than say that I entirely agree in the view taken of this case by my noble and learned friend.

LORD CAMPBELL :

I was present during the whole of the argument, and, as my duty required, very attentively listened to what was urged on both sides, and I have since most carefully perused the opinions of the learned Judges, and have arrived at the same conclusion with my noble and learned friend, that the judgment of the Exchequer Chamber ought to be reversed. I entirely approve of the judgment of the

Court in which the action was brought. It seems to me that the meaning of the condition imposed by this leasing power was merely that the rent should be reserved in respect of the whole of the \*term, and should be payable during that term; and if those two requisites were observed, there was nothing unreasonable in the mode in which the power was exercised with a view to the benefit of the estate, and the lease would be valid. Now it is clear that a rent was reserved in respect of the whole term; because, although the last half-year's rent was to be paid on the 1st of August, it was with reference to the period at which the term ended. It was payable within the term, because it was payable on the 1st of August, a day prior to the expiration of the term. Then was not it a reasonable execution of the power?

A question was put to the counsel at the Bar, whether if the rent had been reserved on the first day of every year, that would have been a good execution of the power. That might be very doubtful; because it is quite clear that if such a condition were imposed upon the tenant, he would not give by any means so good a rent as he would if allowed to occupy for the year, and to cultivate the farm, and to receive the profits of the farm six months before any rent was payable; and I do not know whether that would be at all consistent with the good management of the estate: I think, on that ground, that to have made the rent payable on the first day of the year would not have been a reasonable reservation. But when you see that every half-year's rent was made payable at the expiration of the half-year, until we come to the last half-year's rent, and that that was reserved payable on the 1st of August, for the reason that there might be a distress when the crops were on the ground, so as to enforce the payment, it was clearly for the benefit of the estate; and whether the tenant for life or the remainder-man might take advantage of it, it seems to me an entire compliance \*with the power of leasing contained in the will. There is no reason to suppose that the testator looked peculiarly to the benefit either of the tenant for life or of the remainder-man; his anxiety was, that a lease should be executed which should be consistent with a reasonable management of the estate, and for the benefit of the person who was in the occupation of the estate, whoever he might be. There was here just as good a chance that it might be for the benefit of the remainder-man as for the benefit of the tenant for life. Therefore, upon reason and upon principle, I have no doubt that the power was well executed.

RUTLAND  
v.  
WYTHE.

[ \*469 ]

[ \*470 ]

RUTLAND  
v.  
WYTHE.

I am happy to think, that although there was a *dictum* of Mr. Justice BAYLEY referred to, which is not very express or directly in point, and which may be explained away; yet, on the other hand,—I am sure I speak with the most sincere respect for Mr. Justice BAYLEY,—if I am to weigh his authority against that of Mr. Justice POWELL, confirmed by Lord HOLT, I must say that his authority does not amount to an equipoise; and then if we look at principle, I think upon principle it seems to me, with great respect for the opinion of the dissenting Judges, that this was clearly a good execution of the power of leasing.

It was then ordered and adjudged by the Lords, &c., that the judgment given in the Court of Exchequer Chamber, reversing the judgment of the Court of Exchequer, be reversed: and it was further ordered and adjudged that the original judgment of the Court of Exchequer be affirmed.

1842.  
June 27.  
July 24.  
1843.  
Aug. 18.

### ROBSON v. ATTORNEY-GENERAL.

(10 Clark & Finnelly, 471—507.)

[THIS was an appeal from a decision by Lord BROUGHAM, L.C., in 1830, reported under the title of *Monkton v. Att.-Gen.*, in 34 R. R. 98 (2 Russ. & My. 147), where Lord BROUGHAM's judgment is fully reported. Upon the present appeal Lord BROUGHAM observed (p. 505) that he retained his opinion upon the case. Lord CAMPBELL (p. 506) and Lord COTTENHAM (p. 507) also thought that the order of the Court of Chancery ought to be affirmed and the

*Appeal dismissed.*]

### HOARE v. BYNG(1).

(Affirmed, 10 Clark & Finnelly, 508—533; affirming 5 Beav. 564.)

1844.  
Feb. 26, 27.  
Lord  
LYNDHURST,  
L.C.  
Lord  
BROUGHAM.  
Lord  
COTTENHAM.  
Lord  
CAMPBELL.  
[ 508 ]

A testator left all his personal estate, subject to legacies, and all his houses, gardens, parks and woods, and all his landed estates, to his wife for her life, and afterwards all his personal and landed estates to his sister, for her life, and then to the eldest son of G. B., and afterwards to G. B.'s second, third, or any later sons he might have by the testator's niece A., and then to the eldest son and other sons successively of the Earl of B. by the testator's niece C.; but all these to be subject to outpayments and legacies by the will given; and if they and the conditions of his will were not complied with exactly, he left all the advantages of it to the next person in succession, subject to the legacies and so on, unless they were

(1) *In re Percy* (1883) 24 Ch. D. 616, 53 L. J. Ch. 148.

discharged. The testator, by codicils to the will, gave numerous legacies and annuities, upon the nonpayment of which he declared repeatedly and in various forms of expression that the persons taking his personal estate should be subject to the penalties in the will. G. B. had several sons, all living at the death of the testator.

Held that the eldest son of G. B. took the personal estate absolutely, subject to the prior life estates and to the legacies and annuities given by the will and codicils.

HOARE  
v.  
BYNG.

THE question in this appeal was, whether the respondent George Byng is entitled absolutely, or for life only, to the residuary personal estate of the late Earl of Strafford, subject to certain annuities charged thereon and still subsisting, under and by virtue of the provisions contained in the will of that nobleman, who died in 1791.

William Earl of Strafford, by his will, dated the 25th of October, 1774, gave as follows: "I leave to my dear wife, Anne Countess of Strafford, all my personal estate whatsoever, except the furniture of Wentworth Castle, for her life, subject to the following outpayments and legacies: I also leave to my \*wife, Anne Countess of Strafford, all my houses, gardens, parks, and woods, and all my landed estates, for her life, and afterwards all my personal and landed estates to my eldest sister, Lady Anne Conolly, for her life, and then to the eldest son of George Byng, Esq. of Wrotham Park, and afterwards to his second, third, or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son and other sons, successively, of the Earl of Buckingham by my niece Caroline; but all these to be subject to the following outpayments and legacies."

[ \*509 ]

The testator then gave several legacies to his wife and to his friends, and annuities for life to persons in his employment; and added, "If the legacies and conditions of this my will is not complied with exactly, then I leave all the advantages of it to the next person in succession, subject to these legacies and so on, unless they are discharged." He appointed the Earl of Dartmouth and three others his executors.

The testator afterwards made 13 codicils. By the first, dated the 26th of January, 1778, after giving several legacies and annuities, he added, "If these legacies are not paid punctually, those that inherit my personal estate are subject to the penalties in my will." By the second, after several bequests of pictures, he gave small annuities to four of his servants for life, adding to each the words, "to be paid on the same conditions as the other annuities I have left." By the third, after appointing Lord THURLOW (Lord Chancellor) a trustee and executor, in addition to those named in his will, and after giving other legacies and annuities, he added,

HOARE

v.  
BYNG.

[ \*510 ]

“If these legacies are not exactly paid, those that have my personal estate are to be subject to the penalty in my will.” By the fourth, after giving an annuity to his coachman for \*his life, he added, “and I mean this legacy to be secured to him the same as the others I have left, and that my trustees and executors will see it performed.” By the sixth he gave further annuities to his servants; and added, “these legacies to be faithfully paid under the same restraints as the others in my will and codicils.” By the seventh he gave his wife’s servant, H. W., 50*l.* a year, “to be paid yearly during her life by my heirs that have my personal estate, and on failure of doing so my heirs are to be subject to the same penalties as they are to be subject to in not paying the other legacies and annuities. I also leave to S. R., my footman, the additional sum of 40*l.* a year, to be paid yearly during his life, and 200*l.* in money, to be added to what I have left him in another codicil; on failure of my heirs to my personal estate doing this, they are to be subject to the same penalties in my will for not paying the other legacies and annuities. I leave to Frederick William Wentworth, Esq., of Dorsetshire, the sum of 5,000*l.*, and to Mrs. Wentworth, his wife, the sum of 2,000*l.*; my heirs, on failure of this payment, to be subject to the penalties in my will.” The eighth codicil began thus: “I write this codicil to be added to the other codicils of my last will; that I would have all the conditions and legacies in my will and codicils exactly executed as I have directed, with the penalty of any failure as I have directed.” Then followed two legacies of 3,000*l.* each to a nephew and niece of the testator, and a devise of real estate to his footman S. R. and heirs for ever. By the ninth, after giving further annuities to his servants for their lives, he added, “my heir to be subject to all former penalties relating to my legacies, if these are not regularly paid.” By the

[ \*511 ] tenth he gave further legacies; and added, “these \*legacies to be exactly paid by whoever has my personal estate, or else my personal estate to go on the same conditions to the next I have entailed it to.” The twelfth began thus: “I add this codicil to my will, which is to be fulfilled by my heir to my personal estate, or else he is to forfeit, to the next person I make my heir, all I have left him.” Then followed several bequests of annuities and legacies. The thirteenth and last codicil, dated the 9th of January, 1791, began thus: “I add this codicil to my will, to be fulfilled under the same conditions as my will and other codicils;” and it ended with further bequests.

The will and the eighth codicil only were duly executed and attested so as to pass real estates.

HOARE  
v.  
BYNG.

The testator survived his said wife, and died in March, 1791, leaving his sister, Lady Anne Conolly, him surviving. The will and codicils were duly proved in the same year by Henry Seymour Conway alone, one of the executors named therein.

George Byng of Wrotham Park, named in the will, had four sons; namely, George Byng the respondent, his eldest son, and John, William, and Robert Byng; who were all living at the death of the testator.

In January, 1792, [a suit was commenced by Lady Anne Conolly for the administration of the personal estate of the testator, and various proceedings were taken in that suit].

Lady Anne Conolly died in 1797, and the suit was revived by her executors, Sir W. Howe, Hugh Hoare, and others (1). It appeared from the Master's subsequent reports, and from decrees and orders of Court, that the fund arising from the testator's estate, and \*vested in the 3 per cent. Consols, in the year 1806 exceeded 307,000*l.*, the interest of which has been regularly paid to the respondent George Byng, according to the said decrees and orders, "without prejudice to his claim to the capital."

[ 513 ]

[ \*514 ]

The suit having afterwards become abated by the deaths of parties from time to time, was as often revived by various orders of the Court.

In June, 1841, the respondent G. Byng filed a bill of revivor and supplement, which was amended in February, 1842, against John Baron Strafford, formerly John Byng, the respondent's next brother, and against the then personal representatives of the testator and of Lady Anne Conolly and the other next of kin of the testator, praying that it might be declared that, under the bequests contained in the said will and codicils, he, the respondent, became upon the death of Lady Anne Conolly absolutely entitled to all the residuary personal estate of the said testator, then (in 1842) amounting to 375,156*l.* 3 per cent. Consolidated Bank Annuities, besides other sums standing to the credit of the causes; and that the said sum and sums might be ordered to be transferred to him accordingly.

The defendants having put in their answers, the MASTER OF THE ROLLS, on the hearing of the causes in June, 1842, made an order

(1) See *Howe v. Earl of Dartmouth*, 6 R. R. 96 (7 Ves. 137).



HOARE  
v.  
BYNG.

of reference to the Master to inquire and state who were the next of kin of the testator at his death, and who were the personal representatives of such of them as died since. The Master, in pursuance of that order, made his report in July, 1842.

[ \*515 ]

The causes came afterwards to be heard before the Master of the Rolls upon the said report, and upon a \*petition presented by the respondent, stating and praying to the same effect as his said bill. The representatives of the next of kin of the testator resisted the respondent's claim, insisting that the several persons to whom the testator had bequeathed his personal estate after the death of Lady Anne Conolly, were entitled only to life interests therein, and that the capital being undisposed of, became after their deaths divisible among the testator's next of kin.

THE MASTER OF THE ROLLS, by his decree (1), dated the 31st of January, 1843, declared that the respondent George Byng, under the bequests contained in the said will and codicils, became upon the death of Lady Anne Conolly, and then (at the date of the decree) was, absolutely entitled to all the residuary personal estate of the said testator, subject to such charges as are still subsisting upon or affecting the same, and the same was ordered and decreed accordingly; and it was further ordered, that the residue of the sum of 376,106*l.* 19*s.* 6*d.* Bank 3 per cent. Annuities, standing in the name of the Accountant-General in trust in the causes,—after payment of costs of all parties,—not having any subsisting charge or incumbrance affecting it, should be transferred to the said respondent.

The personal representatives of Lady Anne Conolly and of the other next of kin of the testator, appealed against the decree.

*Mr. Kindersley* and *Mr. Turner* (with whom was *Mr. E. J. Lloyd*), for the appellants.

[The arguments of counsel sufficiently appear from the following judgments.]

[ 522 ]

The *Solicitor-General* and *Mr. Romilly* appeared for the respondents, but were not called on.

THE LORD CHANCELLOR:

The material part of the will, on which the question turns, is extremely short: "I also leave to my wife, Anne Countess of

HOARE  
v.  
BYNG.

Strafford, all my houses, gardens, parks, and woods, and all my landed estates, for her life; and afterwards all my personal and landed estates to my eldest sister Lady Anne Conolly, for her life; and then to the eldest son of George Byng, Esq. of Wrotham Park; and afterwards to his second, third, or any later sons he may have by my niece Anne, Mrs. Byng, and then to the eldest son and other sons successively of the Earl of Buckingham by my niece Caroline."

It was argued by the counsel for the appellants, and very properly argued, that as to the first clause, "I also leave to my wife, Anne Countess of Strafford, all \*my houses, gardens, parks, and woods, and all my landed estates, for her life," the words "landed estates" are a mere description of the property, and do not denote the quantity of interest; and therefore they argued, and I think fairly argued, that, in the next passage, "and afterwards all my personal and landed estates to my eldest sister Lady Anne Conolly, for her life," the words, "landed estates" have exactly the same meaning, and that, therefore, again they have the same meaning as applicable to the gift to "the eldest son of George Byng, Esq. of Wrotham Park;" and the learned counsel then come to this conclusion, that as there are no words of inheritance, this gift, as far as the landed estates are concerned, carries only an estate for life. They then follow that conclusion up by this argument: But before I proceed to that, I should state, with respect to the personal estate, that when the testator conveys his personal estate, he conveys all his personal estate to Lady Anne Conolly for life, and then to the eldest son of George Byng, Esq. of Wrotham Park. Those words require no addition of words of inheritance, as regards the personal estate. The personal estate by those words would pass absolutely; therefore, although the real estate might be an estate merely for life, the words are clearly sufficient to pass the personal estate absolutely. Then the learned counsel make use of this argument: they say it was intended that the real estates and the personal estate should go together to the same person, and be vested always in the same person; and as the real estates are only estates for life, therefore (they say) the personal estate must also be considered as an estate for life. But the real estates are estates for life, merely because no words of inheritance have been added; and it does not follow, that \*because by that omission there is a failure of the object, the personal estate is an estate only for life. That argument, therefore, has no weight. It appears to me that the circumstance of the real

[ \*523 ]

[ \*524 ]

HOARE  
v.  
BYNG.

estates being only estates for life, in consequence of the omission to add words of inheritance, the object which the testator is supposed to have in view, namely, that the personal estate and the real estates should go to the same persons, has on that account failed, and therefore no inference can be drawn from that circumstance.

But then it is said that, though by the words "then to the eldest son of George Byng, Esq. of Wrotham Park," if they stood alone, an absolute estate would be conveyed, yet that the additional words "and afterwards to his second, third, or any later sons that he may have by my niece Anne," alter the nature of the estate. I do not understand how they alter the nature of the estate. The personal estate is absolutely given by the most distinct words to the eldest son of George Byng, Esq. of Wrotham Park. If an absolute estate is given to him by those words, it does not follow that any alteration is made in that estate, because, after the termination or supposed termination of that estate, which can in point of law have no termination, another disposition of the property immediately afterwards is made; therefore I do not think that that argument at all applies. An absolute estate is given, and the will adds, that after the expiration or termination of that estate, then some other person shall take. That estate never does terminate; then there is no other person that can take it.

[ \*525 ]

It is material to observe, that in the two former dispositions, when the testator intends to give estates for life, estates for life are in terms given; they are not in a remote part of the will, but in the clause \*which immediately precedes: an estate for life is in terms given to the Countess of Strafford, and an estate for life is in terms given to Lady Anne Conolly; and then there is this disposition of the property immediately afterwards, to the eldest son of George Byng, and it is given to him without any limitation as to its being an estate for life: that being an absolute estate, the disposition after the termination of that estate is an absolute disposition of a nonentity, and is altogether void, and appears to me to have no effect whatever. Therefore, I think, under these circumstances, that the decision of the Court below must be affirmed.

LORD BROUGHAM :

I entirely agree in the view which my noble and learned friend has taken of this case. In the first place, it is not immaterial to observe, that when the testator clearly meant to give a life estate, he leaves no doubt whatever about it; he gives to his widow for her

life; he gives to his sister for her life; and there is no question which can be raised whether or not to those two devisees and legatees he intended an absolute interest or a life estate. Then immediately and in succession following those two devises and gifts in terms for life, come these words: and they are not “then and in the same manner,” or “and then in like manner,” or “and then and also likewise,” which might raise some doubt; but as if he were addressing himself to a totally different subject-matter, he addresses himself to a totally different party, namely, the son of his niece, Lady Anne Conolly’s daughter, his own great nephew; he then gives it in the words which have raised this controversy, respecting which one is only surprised, considering the vast sum at stake, that half a century should have been suffered to elapse by the respondent \*remaining in calm contentment, without taking the opinion of the Court, as has been done by this convenient proceeding: “And then to the eldest son of George Byng, Esq. of Wrotham Park; and afterwards to his second, third, or any later sons he may have by my niece Anne.”

HOARE  
v.  
BYNG.

[ 526 ]

Now it is quite clear that “then” must refer to the verb and the substantive before; that is to say, “I leave to my wife all my houses, gardens, parks, and woods, and all my landed estates, for her life; and afterwards all my personal and landed estates to my eldest sister Lady Anne Conolly, for her life; and then to the eldest son of George Byng, Esq. of Wrotham Park.” Here he is making a gift out and out of his whole personal estate,—and we are now only considering the question as to the personal estate. He gives his whole personal estate out and out to Mr. George Byng’s eldest son; that is perfectly clear; and if he (the eldest son) had predeceased the testator, it would have been a gift also to his brother next in succession, him surviving.

But then, as it is quite clear the decision would be against the appellants if you were only to read this phrase, stopping at the words “Wrotham Park;” in order to make it appear that that gift is qualified or retracted as it were, but at all events restricted by what follows, they (the appellants’ counsel) take in the words next immediately following, that is to say, “and afterwards to his second, &c. sons.” Now I do not think it ever was decided, I am not aware that it has ever been contended, that a gift of an absolute interest, followed by a gift to another person of the same absolute interest, restricts the first absolute interest to a life estate by combining the two clauses of gift together, as if they formed one

HOARE  
 f.  
 BYNG.  
 [ \*527 ]

gift; whereas they \*form in fact two gifts; first to George Byng's eldest son, the first taker, and after him to the second son. I therefore consider that this is neither more nor less than that which the MASTER OF THE ROLLS has decided, a fee first given, and then mounting on that another fee; that is to say, an absolute interest in the personalty given to the eldest son of George Byng, and subsequent to that, and not as parcel of that gift, in which case it might qualify it, but subsequent to that, an attempt to give to G. Byng's second son that, which it was impossible to give, namely, that which remained, after the whole was exhausted by the gift to Mr. G. Byng's eldest son. Now what remained? Nothing, as has been observed by my noble and learned friend, nothing whatever remained; because the first gift is to the eldest son of George Byng of the whole, and the whole being exhausted by that gift, nothing whatever remained.

[ \*528 ]

I entirely leave out of view, in my judgment, two things. In the first place, I leave out of view all that is said respecting the charges; and why? Because some little doubt may exist on the argument as to the charges; first as to whether they were charges on the real estate, in which case they would not operate to enlarge the fee; or whether they were charges on the personal estate, in which case they would operate to enlarge the fee. I hold it to be quite immaterial to go into that, because that is by no means so clear as the construction of the clause of gift itself; and I have no occasion to seek for a worse argument, when I think I have a better argument to resort to. The other thing which I purposely leave out of view is, whether or not my opinion would be the same with respect to the real estate; and I purposely leave that out of view; for this reason, because it is not necessary \*to decide one way or the other as to the realty. We are here only on the personalty; we can only be here as to the personalty. The real estate being affected by no trust, there is no possibility of taking the opinion of a court of equity upon it; consequently until an ejectment is brought on the decease of Mr. George Byng,—which I hope will be at a very distant period,—there is no chance of that question being tried at law. But I must say that I do not wish to be understood to be clearly of opinion, very far from it, that this is an estate for life of the realty, any more than an estate for life of the personalty. I am not called upon to give an opinion upon that, but if I were to give an opinion, I am not at all clear that I should not give it in the same way with respect to the realty as I do with respect to

the personality. But why should I enter upon that? The argument in respect of the realty may be rested on totally different grounds from any that we have with respect to the personality; and therefore, for both those reasons there is no necessity for our deciding that question.

HOARE  
v.  
BYNG.

Last of all, I shall just mention two cases which have been cited by the learned counsel: *Awse v. Melhuish* (1), and *Doe v. Lean* (2); cases more wide of the present could hardly be cited, in my opinion, than those. (His Lordship having stated the points disputed in both cases, observed as to the latter:) Now that case is so clear that one wonders that it should ever have been disputed. There are no words, or anything like words, of inheritance. The words are, "an estate called L. in the parish of B.;" anything more completely showing that "estate" there means a close or a piece of land called L. in the parish of B., cannot be conceived: no man's \*estate or quantity of interest is called "L. in the parish of B.;" it refers to a particular parcel of land which is situate in the parish of B., and so named; consequently that was the subject of that gift. Afterwards it was said the same shall go so and so; and the word "same" must no doubt refer to the last antecedent, namely, "an estate called L. in the parish of B.;" therefore the argument resting on the general use of the word "same," could only rest on the omitting all this, and substituting the word "same;" the same estate, if it had been the same estate in the will, that might have been sufficient to pass a fee, but that was not the meaning of the word "same;" the meaning of it was the estate L. before mentioned, in the parish of B.

[ \*529 ]

For these reasons, considering that those cases really have no application whatever to the present, I entirely agree with my noble and learned friend that this judgment is well grounded; and without entering into all the argument, I think it sufficient to say that in my opinion the MASTER OF THE ROLLS has taken a correct view of this case; for he expressly states that it is impossible in law to give to A. a right to a thing out and out, to give the absolute interest in that thing, and then afterwards to restrict that absolute gift by a limitation over. That would be attempting to do that which is impossible, to limit the fee which is given in the first instance. Observing merely, therefore, that the grounds on which we have to proceed appear to be the same on which the Court below pronounced the decision, I am entirely of opinion

(1) 1 Br. C. C. 519.

(2) 1 Q. B. 229.

HOARE  
 v.  
 BYNG.

with my noble and learned friend that the judgment ought to be affirmed.

LORD COTTENHAM :

[ \*530 ]

I am also of opinion that this \*judgment ought to be affirmed ; and that, in the ordinary meaning of the words which are used in the will, they are clearly sufficient, taken by themselves, to convey an absolute interest ; and I do not find in any of the other testamentary papers any sufficient reason to give any other construction to those words than that which is the clear and proper meaning of them. The two estates are joined, and one argument was that there was an intention on the part of the testator that they should go together. Beyond all doubt, that was his intention ; but the same rule not being applicable to real estate which is applicable to personal estate, the intention clearly enough expressed upon the face of the will is not capable of being carried into effect. Now, for instance, supposing the arguments which have been used on the part of the appellants were correct, and the word “ estate ” meant a mere description of the property, then there being no words descriptive of the extent of interest, and no words of inheritance, if that be the construction put on the will, the consequence would follow of taking the real estate out of that course in which the testator evidently intended it should go. That does not apply to the personal estate at all ; no words of inheritance being necessary, and the same reason would not operate on the construction of the will with reference to the personal estate as with reference to the real estate. The question as to the real estate not being before us for consideration, I do not express any opinion upon it, further than to say that the failure of the testator’s intention as to the real estate, furnishes no ground for coming to a conclusion that the same consequence must follow as to the other part of the disposition, which relates to the personal estate.

[ \*531 ]

Now I am dealing with the personal estate, and I \*find it given to two persons for life specified, and then the words used, “ and then to the eldest son of George Byng.” The words “ then ” and “ afterwards,” which are used in this will, seem to be used with the same meaning ; where they have an antecedent, there is no difficulty in putting a construction upon them. When the estate is given for life, then come the expressions “ then ” and “ afterwards,” which must mean after the expiration of that interest before mentioned ; namely, the expiration of the life. That is the measure of the

HOARE  
v.  
BYNG.

interest which is given, and when that has been given to George Byng's eldest son, come the words "and afterwards." To what do those words refer? Why, they refer to the antecedent gift, and, by no means give any clue by which you are to ascertain the extent of the antecedent gift. It is said, truly, that if the gift is absolute and conveys the whole interest, then there can be no "afterwards," because that interest being absolute, the time would never come when it would be determined. If you are to cut down the interest of the gift given to the eldest son of George Byng, then what comes afterwards? what are you to introduce in its place? what clue, what test, have you of what the testator intended? If you are to speculate on the probability, the probability is that he did not mean to give to those persons in succession an interest during their own lives, without any means of providing for the families which they might have. We are not at liberty to speculate upon what the testator did intend; we can only collect the intention by the terms which he has used. The great probability is, if we were to speculate at all, that he contemplated some event, that there was some idea floating in his mind that the gift which he had so intended \*for the eldest son, might not take effect, by the death of that eldest son in his own lifetime, or some other event floating in his mind, and that then he meant to express an intention that these several families should succeed in the order named. It is quite sufficient, however, for the present purpose to say, that those words cannot cut down a gift which, in its terms, is sufficient to convey the absolute interest. On these expressions, therefore, upon the words of the gift itself, my opinion is formed that there is enough, according to the rules of law, to give the absolute interest, and that there is nothing in the other parts of the will sufficient to justify a court of equity, or any Court called upon to put a construction upon a will such as this is, in cutting down the interest, and introducing, instead of that larger interest, an interest of a smaller description. I will not proceed on the ground of these gifts being that sort of obligation on the legatees which would enlarge the interest, if it was not before given, because according to the construction put upon the will it is immaterial to consider that; the terms in which it is given being sufficient to give the whole.

[ \*532 ]

Then it is impossible to look at these codicils and not to see that the testator thought that some, at least, of those persons who were to take under his will, would take an absolute interest, and not merely estates for life. There is scarcely one of the expressions suitable to the



HOARE  
v.  
BYNG.

situation of a tenant for life. It is perfectly true that there were two tenants for life, who may be, or probably were, included in the description of these codicils. All these expressions indicate some person having the power of disposing of the property; he speaks of the heir; he speaks of the person who inherits the property; expressions not \*at all consistent with the supposed intention of the testator; namely, that he meant to give only successive estates for life.

[ \*533 ]

It appears to me that there is not anything in this will sufficient to justify the construction contended for by the appellants; and on these grounds, therefore, I am of opinion that the judgment should be affirmed.

LORD CAMPBELL :

I am clearly of opinion that this judgment ought to be affirmed. I think it is quite enough, after what has fallen from my noble and learned friends, to say that the words of this will clearly give an absolute interest in the personalty to the eldest son of George Byng, of Wrotham Park; and I find no words at all to cut down the gift of that absolute interest.

LORD BROUGHAM :

This is so clear a case, that I think the respondents should have their costs.

The decree was then

*Affirmed with costs.*

1843.  
*Feb.* 13, 14,  
16, 17.  
*July* 7.  
*Aug.* 10, 11.

## REGINA v. GEORGE MILLIS (1).

(10 Clark & Fennelly, 534—907; S. C. 8 Jur. 717.)

Canon law—Marriage.

1844.  
*Feb.* 23.  
*March* 29.

Lord  
LYNDHURST,  
L. C.

TINDAL,  
Ch. J.

Lord  
CAMPBELL.

Lord  
BROUGHAM.

Lord  
ABINGER.

Lord  
DENMAN.

Lord  
COTTENHAM.

[ 534 ]

A., a member of the Established Church in Ireland, went, accompanied by B., a Presbyterian, to the house of C., a regularly placed minister of the Presbyterians of the parish where C. resided, and there entered into a present contract of marriage with the said B.; the minister performing a religious ceremony between them, according to the rites of the Presbyterian church. A. and B. lived together for some time as man and wife, A. afterwards, B. being still alive, married another person, in a parish church in England. *Qu.* whether the first contract, thus entered into, was sufficiently a marriage to support an indictment against A. for bigamy?

Lord BROUGHAM, Lord DENMAN, and Lord CAMPBELL, were of opinion

(1) Cited and followed in *Catherwood v. Caston* (1844) 13 M. & W. 261; *Beamish v. Beamish* (1861) 9 H. L. C. 274; *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1, 25, 40 L. J. Q. B. 28; *Culling v. Culling* [1896] P. 116, 65

L. J. P. 59; *In re De Wilton* [1900] 2 Ch. 481, 491, 69 L. J. Ch. 717 (dist.); and see *Law Quarterly Review*, v. 44; Pollock & Maitland, *Hist. of English Law*, ii., p. 372 (2nd ed.).

that it was: The LORD CHANCELLOR, Lord COTTENHAM, and Lord ABINGER, were of opinion that it was not. The Lords being thus divided, the rule "*semper præsумitur pro negante*" applied, and judgment was given for the defendant in error.

REG.  
r.  
MILLIS.

It is an inflexible rule of the House to hear only two counsel for each party in any one case; and the House will not avoid the effect of this rule by permitting one senior and one junior counsel to be heard in the opening, and a third counsel to reply.

At the Spring Assizes of 1842 for the county of Antrim, the defendant in error, Millis, was indicted for bigamy, under the statute 10 Geo. IV. c. 34. He was arraigned upon this indictment, and pleaded not guilty, and thereupon issue was joined. The jury found the following special verdict: "That in the month of January, 1829, George Millis, accompanied by Hester Graham (spinster), and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister \*of the congregation of Protestant dissenters commonly called Presbyterians, at Tullylish, near to Banbridge aforesaid; and that the said prisoner and the said Hester Graham then and there entered into a contract of present marriage, in presence of the said Rev. John Johnstone and the said other persons, and the said Rev. John Johnstone then and there performed a religious ceremony of marriage between the said prisoner and Hester Graham, according to the usual form of the Presbyterian church in Ireland; and that after the said contract and ceremony, the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the period of said ceremony known by the name of Millis. And the jurors aforesaid, upon their oath aforesaid, further say that the said George Millis was, at the time of the said contract and ceremony, a member of the Established Church of England and Ireland, and that the said Hester was not a Roman Catholic, but the jurors aforesaid do not find whether she, the said Hester, was a member of the said Established Church or a Protestant dissenter. And the jurors aforesaid, upon their oath aforesaid, further find, that afterwards, upon the 24th day of December, 1836, and while the aforesaid Hester was still living, the said George Millis was married to one Jane Kennedy, then spinster, in the parish of Stoke, in the county of Devon, in England, according to the forms of the said Established Church, by the then officiating minister of the said parish, he being then and there a priest in holy orders; but whether," &c.

[ \*535 ]

REG.  
v.  
MILLIS.

The indictment and special verdict were afterwards removed by *certiorari* into the Court of Queen's Bench in Ireland, and the case was argued there in Easter Term, 1842.

[ 536 ]

The Judges of the said Court afterwards delivered their judgments *seriatim* on the said case : Mr. Justice PERRIN was in favour of the validity of the first marriage, even as a marriage *per verba de præ-senti*, and consequently of the conviction : Mr. Justice CRAMPTON thought it a valid marriage, but only so as being celebrated by a Presbyterian clergyman : Mr. Justice BURTON thought the marriage invalid in every way ; and with that opinion Lord Chief Justice PENNEFATHER entirely concurred (1).

Afterwards, and for the purpose of obtaining the judgment of this House, Mr. Justice PERRIN in form withdrew his judgment ; and thereupon the said Court adjudged that the said George Millis, the now defendant in error, was not guilty of the felony in the indictment charged against him, and he was thereupon acquitted.

This writ of error was then brought, and now came on for argument in the presence of Tindal, Ch. J., Patteson, Williams, Coleridge, Erskine, Cresswell and Maule, JJ., and Parke, Alderson, and Rolfe, BB.

The *Attorney-General* applied to the House to permit the hearing of counsel in the following manner : He proposed to address the House in the first instance, and requested that *Mr. Waddington* should be permitted to follow ; and that after the counsel for the defendant in error had been heard, the *Solicitor-General* should be allowed to reply.

THE LORD CHANCELLOR :

We cannot do that ; it is contrary to our rule. The House can only hear two counsel. If the *Solicitor-General* is to be heard, he must address the House in the first instance.

The *Attorney-General* and the *Solicitor-General* for the plaintiff in error. \* \* \*

*Mr. Pemberton* and *Mr. Kindersley* for the defendant in error. \* \* \*

[ 653 ]

Questions were then put to the Judges, who required time to consider them.

(1) See " Report of the cases of Easter and Trinity Terms, 1842 ; by *Regina v. Millis*, and *Regina v. Carroll*, Edmund Spencer Dix, Esq., Barrister-at-law ; Dublin."

LORD CHIEF JUSTICE TINDAL :

REG.  
C.  
MILLIS.

My Lords, the first question (1) which your Lordships have proposed to her Majesty's Judges is the following : " A. and B. entered into a present contract of marriage *per verba de præsenti* in Ireland, in the house and in the presence of a placed and regular minister of the congregation of the Protestant dissenters called Presbyterians ; A. was a member of the Established Church of England and Ireland ; B. was not a Roman Catholic, but was either a member of the Established Church or a Protestant dissenter ; a religious ceremony of marriage was performed on the occasion by the said minister between the parties, according to the usual form of the Presbyterian church in Ireland ; A. and B., after the said contract and ceremony, cohabited and lived together for two years as man and wife ; A. afterwards, and while B. was living, married C. in England :— Did A. by the marriage in England commit the crime of bigamy ? "

In order that your Lordships should apprehend clearly the grounds of our answer to this question, we think it will be convenient to consider, in the first instance, separately, the general and abstract question, what were the nature and obligatory force of a contract of marriage *per verba de præsenti*, by the English common law, previous to the passing of the Marriage Act, 26 Geo. II. : And that we should then consider the same question with reference to the particular conditions and circumstances with which it has been submitted for our opinion.

My Lords, the abstract question we propose first \*to consider is one involved in much obscurity : and if Serjeant Maynard, the most learned lawyer of his day, was compelled to state, in a debate on the commitment of the Marriage Bill passed by the Parliament in the time of the Commonwealth (2), " that the law lies very loose as to things that are naturally essential to marriages, as to precontracts and dissolving marriages ; " and if Lord Chief Justice Holt and other eminent Judges have since been found to express themselves with considerable uncertainty upon the same subject ; it may well become us, the Judges of England of the present day, when for nearly a century the whole doctrine relating to contracts of marriage, as contradistinguished from marriage itself, has become nearly a dead letter in our Courts, to confess that the subject is

[ \*654 ]

(1) The first of the two questions put to the judges, and stated by the Chief Justice, involved the second, which supposed the contract of marriage to

have been entered into in the presence of a layman only. Note in corrigenda to original report.

(2) See 2nd vol. Burton's Diary, 337.

REG.  
F.  
MILLIS.

involved in still deeper obscurity than in the time of our predecessors, and to acknowledge ourselves unable to trace out and define the boundary between the contract and marriage itself, with absolute certainty. Indeed the learning and ingenuity which have been brought to bear on the subject, as well by the Judges of her Majesty's Court of Queen's Bench in Ireland, amongst whom a difference of opinion has prevailed, as by the counsel at your Lordships' Bar, upon the argument of this case, is a proof that arguments of great weight, and authorities of which it is impossible to deny the application to the subject-matter of controversy, may be advanced on either side of this disputed proposition.

[ \*655 ]

In this state of the question, it is only after considerable fluctuation and doubt in the minds of some of my brethren that they have acceded to the opinion \*which was formed by the majority of the Judges upon hearing the argument at your Lordships' Bar, and that I am now authorised to offer to your Lordships as our unanimous opinion, that by the law of England, as it existed at the time of the passing of the Marriage Act, a contract of marriage *per verba de presenti*, was a contract indissoluble between the parties themselves, affording to either of the contracting parties, by application to the Spiritual Court, the power of compelling the solemnisation of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders.

It will appear, no doubt, upon referring to the different authorities, that at various periods of our history there have been decisions as to the nature and description of the religious solemnities necessary for the completion of a perfect marriage, which cannot be reconciled together; but there will be found no authority to contravene the general position, that at all times, by the common law of England, it was essential to the constitution of a full and complete marriage, that there must be some religious solemnity; that both modes of obligation should exist together, the civil and the religious; that, besides the civil contract, that is, the contract *per verba de presenti*, which has always remained the same, there has at all times been also a religious ceremony, which has not always remained the same, but has varied from time to time, according to the variation of the laws of the Church: with respect to which ceremony it is to be observed, that whatever at any time has been held by the law of the Church to be a sufficient religious ceremony of marriage, the same has at all

\*times satisfied the common law of England in that respect. If, for example, in early times, as appears to have been the case, from the Saxon laws cited in the course of the argument, the presence of a Mass-priest was required by the Church; and if, at another time, the celebration in a church, and with previous publication of banns, has been declared necessary by the ecclesiastical law; and lastly, if, since the time of the Reformation, the Church held a deacon competent to officiate at a regular marriage ceremony; with each of these modes of solemnisation the Courts of Common Law have given themselves no concern, but have altogether acquiesced therein, leaving such matters to the sole jurisdiction of the Spiritual Court. So that, where the Church has held, as it often has done, down to the time of passing the Marriage Act, that a marriage celebrated by a minister in holy orders, but not in a church, or by such minister in a church, but without publication of banns and without licence, to be irregular, and to render the parties liable to ecclesiastical censures, but sufficient nevertheless to constitute the religious part of the obligation, and that the marriage was valid notwithstanding such irregularity, the law of the land has followed the Spiritual Court in that respect, and held such marriage to be valid. But it will not be found (which is the main consideration to be attended to), in any period of our history, either that the Church of England has held the religious celebration sufficient to constitute a valid marriage, unless it was performed in the presence of an ordained minister, or that the common law has held a marriage complete without such celebration.

REG.  
F.  
MILLIS.  
[ \*656 ]

My Lords, in endeavouring to show the grounds upon which we hold that such is the common law \*of this realm, I shall first consider the decisions which have taken place in our Courts of Common Law; as to which, it is scarcely necessary to say that decisions of the Courts of Common Law are at once the best expositors and the surest evidence of the common law itself. I shall next advert to certain statutes passed by the Legislature at various periods, tending to throw light upon the obscure subject now under discussion, and which appear to confirm the opinion we have formed; and lastly, shall call attention to the doctrine of the King's ecclesiastical law, as established and administered in this country; by which alone, and not by the general canon law of Europe, still less by the civil, are the marriages of the Queen's subjects regulated and governed.

[ \*657 ]

And with respect to the decisions of the Courts of Law and the other common-law authorities, if no case can be referred to directly

REG.  
f.  
MILLIS.

and distinctly laying it down as law, in so many words, that a contract *per verba de presenti* alone, and without the intervention of a minister in orders, is not sufficient to create a valid and complete marriage, yet such conclusion is necessary from many of the decided cases, and is inconsistent with none; nor in fact could the difficulty to be determined in any of the cases ever have existed, except upon the supposition that some religious ceremony was necessary to the contract: thus leading to the conclusion above laid down, that by the law of England the contract *per verba de presenti* alone did not constitute a full and complete marriage.

[ \*658 ]

And in referring to these authorities I do not propose to take up each in succession which has been brought in review before your Lordships; it will be sufficient, to support the conclusion above stated, to \*call attention to those which are the most important, and more especially to those of earlier date, as deserving the greater weight.

The earliest case referred to in the argument is the note from Lord Hale's manuscripts, to be found in Coke, Littleton, 33 a, n. 10. That case is, that A. contracts *per verba de presenti* with B. and has issue by her, and afterwards marries C. *in facie ecclesie*; B. recovers A. for her husband by sentence of the Ordinary; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D. and then marries B. *in facie ecclesie*, and dies. B. brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, "*sed reversatur coram Rege et Concilio quia prædictus A. non fuit seisitus, during the espousals between him and B. Nota, neither the contract nor the sentence was a marriage.*"

My Lords, the Curia Regis et Concilii, before which the reversal took place, appears, according to the researches of antiquarians, to have been, in the time of Edward I., a tribunal of appeal in cases of difficulty, and to have consisted at that time of the Chancellor, the Treasurer and Barons of the Exchequer, the Judges of either Bench, and other functionaries; which Court of the Concilium Regis was perfectly distinct from the Commune Concilium Regni, the probable original of the English Parliament.

[ \*659 ]

Lord HALE speaks largely of this Court in his Treatise on the Jurisdiction of the House of Lords; and various references to and extracts from its proceedings are to be found in the learned Introduction to the Rotuli Litterarum Clausarum, lately published by the Record Commissioners. The judgment, therefore, of such a court of error, is of the highest \*weight. Lord HALE's observation

on the case is, “that the sentence was not a marriage;” in making which observation he is probably alluding to a question which, about the time he was making his collection of notes, was a matter of contest in Westminster Hall: viz., whether the man and woman were not complete husband and wife by the sentence of the Spiritual Court, without any other solemnity: as it appears in *Payne's* case (1), that *Mr. Attorney-General Noy* had affirmed such to be the law, whilst *TWISDEN*, Justice, denied it, saying that the marriage must be solemnised before they were complete husband and wife.

REG.  
r.  
MILLIS.

The result, however, of the case above referred to is, that in the judgment of the Court of Error there was no complete marriage until after the actual solemnisation of the marriage under the sentence of the Court; and, upon the ground that the husband enfeoffed D. before such solemnisation, there was no seisin in him during the marriage, and therefore no dower. But the object at present is, to learn from the case whether, in the opinion of the Court, the contract *per verba de presenti* did alone constitute a marriage; and, both from the judgment of the Court below and of the Court of Error, the conclusion appears inevitable, that each Court thought such contract alone did not constitute marriage: for the case sets out with stating that “A. contracts with B. *per verba de presenti* ;” and, if this contract had alone constituted marriage, then was there seisin in the husband during the marriage and before the feoffment to D., and the reason given by each of the Courts for their respective judgments would have \*failed. Observe, also, the difference of language employed in the statement of the facts of the case: the contract *per verba de presenti* ; the subsequent statement that A. married B. ; the contract; and the subsequent reason by the Court of Error, that there was no seisin during the espousals. Can the expressions of contract on the one hand, and of marriage and espousals on the other, possibly be considered as synonymous, and referring to the same obligation? And this agrees expressly with *HALE's* inference from the case, “that the contract is not a marriage.”

[ \*660 ]

*Foxcroft's* case (2), which appears to have been in the same year, is next in order: “R. being infirm, and in his bed, was married to A. by the Bishop of London, privately, in no church or chapel, nor with the celebration of any Mass, the said A. being then pregnant by the said R. ; and afterwards, within 12 weeks after the marriage,

(1) 1 Siderf. 13; in the year 1660.

(2) 1 Rolle's Abridg. 359; see 9 R. R. 411, n. and Preface vii.



REG.  
v.  
MILLIS.

the said A. is delivered of a son, and adjudged a bastard, and so the land escheated to the lord, by the death of R. without heir." Now it is to be observed that this case must have been decided upon the usual plea of bastardy in a real action; the writ must have been sent in the usual form by the Court of Law to the Ordinary; the certificate also returned by him in the usual form. Bracton, in book 5, c. 19, gives various instances of the proceedings in cases of bastardy, with the greatest possible minuteness; and amongst others, that in s. 11 probably would be the form applicable to this particular case; viz. "an pater suus desponsavit matrem suam;" and it could not have been until after the certificate of the Ordinary, affirming or denying the marriage, that the judgment of the \*Court could be given. Let it be conceded that the Ordinary certified in this instance the marriage to be void, which, according to the ecclesiastical law, as then in force in England, he ought to have found good, but irregular only, and exposing the parties to ecclesiastical censures; and let it be further conceded that the Court of Common Law acted upon such finding, and gave judgment against the demandant, as indeed it could not do otherwise; still the weight of this authority on the question before us remains the same. Was a contract *per verba de presenti*, without anything more, held at that time to be a complete marriage? is the question. If it was, the Ordinary must have returned that R. had married A.; for no doubt has been or can be raised, that when the Bishop of London married the two parties, as stated in the case, he married them *per verba de presenti*. If, therefore, the contract *per verba de presenti* had by the law of England then made a marriage, the parties were actually married; but if the Ordinary finds the marriage bad, even where the ceremony was performed by a Bishop, because celebrated at an improper place, the inference appears irresistible that some religious ceremony was necessary, and that words of present contract alone did not at that time, by the law of England, constitute a marriage.

*Del Heith's* case, 34 Edward I., is precisely the same in its leading facts, and in the conclusion at which the Court of Common Law arrives, that a contract *per verba de presenti*, even before the parish priest, was not sufficient; but the concluding words of the record are too strong to be passed over in silence: "Quæsitum fuit si aliqua sponsalia in facie ecclesiæ inter eos celebrata fuerunt postquam prædictus \*Johannes convaluit de prædicta infirmitate.

[ \*661 ]

[ \*662 ]

Dicunt quod non. Et quia convictum est per assisam istam quod prædictus Johannes Del Heith nunquam desponsavit prædictam Katherinam in facie ecclesiæ per quod sequitur quod prædictus W. filius Johannis nihil juris clamare potest in prædictis tenementis sed in misericordia pro falso clamore.”

REG.  
r.  
MILLIS.

The conclusion to be drawn from the comparison of two cases to be found in 1st Rolle's Abridgment, p. 360, leads to the same inference, that the contract *per verba de presenti* was not a complete marriage in the time of Henry VI. The first is at F. placitum 1: “A man who hath a wife takes another wife, and hath issue by her; this issue is bastard by both laws (that is, the common law and the ecclesiastical law), for the second marriage is void.” On the same page he lays it down, in G. placitum 1, a divorce *causâ præcontractus* bastardises the issue: the same case, in the Year Book 18 Hen. VI., pl. 34, being cited for both positions. But if the contract alone makes the marriage, if it is itself *ipsum matrimonium*; where is the necessity for a divorce in the second case to bastardise the issue, which it is admitted is not necessary in the former case? They cannot be reconciled together, except upon the supposition that “having a wife” and “taking a wife,” that is “actual marriage,” was at that time held to be one thing, and “a contract of marriage” another, falling short of the marriage itself. The authority of Perkins, sec. 306 (whose statements, from his citation of the Year Books, may be placed conveniently amongst the decisions of the Courts of Law), is to the same effect: “If a man seised of land in fee make a contract of matrimony with I. S., and he die before the marriage is solemnised between them, she shall not have \*dower, for she never was his wife.” Perkins, indeed, goes on to say, in the same section, “and it hath been holden in the time of King Henry III., that if a woman had been married in a chamber, that she should not have dower by the common law; but the law is contrary at this day.” But, whatever is his opinion of the alteration of the law as to the case of the private marriage (by which he probably meant the ecclesiastical law as to the solemnities requisite, which in fact had been altered), still it has no relation to his first position, which is full, complete, and express to the very point now under consideration. His observation amounts to no more than this, that in Henry III.'s time a marriage was held void which in his day (the reign of Queen Elizabeth) would be held irregular only; and, further, the observation is strong, that Perkins must have meant a different thing by the two

[ \*663 ]

REG.  
v.  
MILLIS.

phrases, "contract of matrimony" and "marrying in the chamber ;" and what other difference can be suggested, except that the one was a contract by words only, the other a contract accompanied by a religious ceremony ?

Again, the doctrine laid down by Perkins, title Feoffments, placitum 194 (for which he cites the Year Book 38 Edw. III., pl. 12), shows the diversity at that time between a contract and a marriage : "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law ; inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife thereof may make a will without the agreement of him unto whom she was contracted, &c. ;" and at the close of the next placitum he says, "but \*after the marriage celebrated between a man and a woman the man cannot enfeoff his wife, for then they are as one person in law." Bracton, in book 2, c. 9, intitled "Si vir uxori donationem facere possit constante matrimonio," may be thought to leave the matter in some doubt whether such gifts would be good even after the contract, as he says, "Matrimonium autem accipi possit sive sit publice contractum vel fides data quod separari non possunt ; et re vera donationes inter virum et uxorem constante matrimonio valere non debent." Now, even if it is considered that by the "fides data" Bracton understood a contract *per verba de presenti*, without any solemnity, it is enough to say he could not be writing as a common lawyer (in fact he was a civilian) when he is found to differ from the authority of the Year Books.

The case of *Bunting v. Lepingwell* (1) is of great weight, and of immediate bearing upon the point in question. Taking the facts from the two reporters (2), it appears that Bunting and Agnes Addishall contracted matrimony between them *per verba de presenti tempore*, and afterwards Agnes took to husband Thomas Twede, and cohabited with him ; and afterwards Bunting sued Agnes in the Court of Audience, and proved the contract, and the sentence was pronounced, "Quod prædicta Agnes subiret matrimonium cum præfato Bunting, et insuper pronuntiatum decretum et declaratum fuit dictum matrimonium fore nullum, &c. ;" which marriage between Bunting and Agnes took place according to the sentence, and they had issue one Charles Bunting ; and whether Charles Bunting was son and heir, was the question for the jury in an

(1) Moore, 27 & 28 Eliz.

(2) Moore, 169 ; and 4 Coke, 29 a.

[ \*664 ]

\*action of trespass brought by him; and the Court held him legitimate, and no bastard. The argument before the Court turned principally on the invalidity of the sentence of the Spiritual Court, by reason of Twede, the husband *de facto*, not being made a party to the proceedings by which his marriage was declared null; the Court, however, holding itself bound to give credit to the Spiritual Court that the proceedings were regular. But the bearing of the case upon the point now under discussion is, whether it establishes a distinction between the contract to marry and "*ipsium matrimonium*," and such seems the necessary inference. This was a trial before the Judges of the common law, who called for the assistance of civil lawyers to argue the case before them, but who must be supposed to know themselves what was the common law; and if the contract *per verba de presenti* between Bunting and Agnes had been what the common law had then recognised as an actual marriage, the second marriage would have been held void without any controversy; no doubt would have existed, and no civilian would have been consulted, any more than if it had been a marriage celebrated *in facie ecclesie*. It is also not unworthy of remark, that the sentence of the Spiritual Court, "*Quod prædicta Agnes subiret matrimonium cum præfato Bunting*," proves that not even by the ecclesiastical law, as administered in England, was such contract held to constitute a complete marriage without the intervention of the religious ceremony.

REG.  
T.  
MILLIS.  
[ \*665 ]

The case of *Wild v. Chamberlayne* (1) is so far of importance as it affords direct proof that in the opinion of Chief Justice PEMBERTON, on the trial of an issue \*"*marriage or no marriage*," words of contract *de presenti tempore*, repeated after a person in orders, was a good marriage; for it was only by importunity of counsel a case was to be made thereof. If such a contract, alone and unaccompanied by a religious ceremony, had been a marriage, surely the case would have been decided on a shorter ground, and the objections, that the parson was an ejected minister, and that the ring was not used at the ceremony, according to the ritual of the Church of England, would never have been urged.

[ \*666 ]

In the case of *Haydon v. Gould* (2), Haydon and his wife were Sabbatarians, and married by one of their ministers in a Sabbatarian congregation, using the form of the Common-prayer, except the ring; but the minister was a mere layman, and not in orders; and after administration granted to Haydon, and subsequently

(1) 2 Show. p. 300.

(2) 1 Salk. 119.

REG.  
v.  
MILLIS.

[ \*667 ]

repealed, the Court of Delegates affirmed the sentence of repeal. The reason given is, "That Haydon, demanding a right due to him as husband by the ecclesiastical law, must prove himself a husband according to that law, to entitle himself in this case." In this case, the book adds, it is urged that this marriage was not a mere nullity, because by the law of nature it was sufficient; and though the positive law ordains it shall be by a priest, yet that makes such a marriage as this irregular only, but not void; but the Court ruled *ut supra*; the reporter adding, that the constant form of pleading marriage is, "*per presbyterum sacris ordinibus constitutum.*" Perhaps the more correct expression might have been, "*per ministrum sacris ordinibus constitutum*;" for, undoubtedly, after the Reformation, a marriage might \*be as well solemnised by a deacon as a priest. But what is the whole result of the case but this, that by the English ecclesiastical law a contract of marriage *per verba de presenti* was not alone sufficient (for such contract there was in fact); but that by the same law, to make the marriage complete, there must be the presence and intervention of the priest? And when it is asked, as it was at your Lordships' Bar, what had the priest to do, or what had he to say? the answer must be, that he married them, and in doing so he used such form of words as were customary at the time of his performing the ceremony. The form of words of present contract found in the ritual of the Church of England as established by the authority of Parliament in the 2 & 3 Edw. VI. c. 1, was not then for the first time made, but in part altered and in part retained from the former rituals which had been handed down from the greatest antiquity; just as it was declared by the Council of Trent (Session 24, c. 1), when it prescribes certain words to be used by the parish priest when performing the office of matrimony; viz. "*Ego vos in matrimonium conjungo, in nomine Patris et Filii et Spiritus Sancti.*" The decree also adds, "*vel aliis utatur verbis, juxta receptum uniuscujusque provincie ritum.*"

[ \*668 ]

The only remaining decision of a court of common law, to which it may be necessary to refer, is the case of *Reg. v. Fielding*, upon an indictment for bigamy (1). The evidence given of the first marriage was, that the parties made a contract *per verba de presenti* in English, in the presence of and following the words of a priest in orders, though he was a priest in the orders of the Church of Rome; and Mr. Justice \*POWELL, in summing up the

(1) 14 State Trials, 1327.

case to the jury, more than once adverts to the fact that the marriage was by a priest. "If you believe Mrs. Villars," he says, "there was a marriage by a priest." There is no reason to infer from this direction to the jury, that if the first marriage in this case had been merely a contract *per verba de presenti*, in the presence of a layman, the offence of bigamy must have been committed; but the inference to be drawn from the summing up of the Judge is directly the reverse.

REG.  
C.  
MILLIS.

My Lords, this being the state of the decided cases from the earliest time to the time of Queen Anne, the principal direct authority adduced on the part of the Crown is the *dictum* of Lord HOLT, in *Jesson v. Collins* (1), "that a contract *per verba de presenti* was a marriage, and this is not releasable;" and the decisions which have subsequently taken place. That case came before the Court upon a motion for a prohibition, upon a suggestion that the contract was in fact *per verba de futuro*, for which the party had remedy at common law, and the case was disposed of by the Court, and the prohibition refused, upon the ground that the Spiritual Courts have jurisdiction of all matrimonial causes whatsoever, and that there was no reason to prohibit them, because this may be a future contract for breach of which an action at law will lie. This appears distinctly from the reports of the same case in 6 Modern, 155; and Holt's Reports, 457. This being the state of the case, HOLT, Chief Justice, in speaking to it before the Court, used the expression above referred to. It is obvious, in the first place, it was unnecessary to the case before the Court; for, whether present words or future words, the prohibition \*must equally be refused. The observation, therefore, is not entitled to the same weight and authority as if it had been the very point of the case before the Court. If by the terms "*ipsum matrimonium*," Lord Holt intended to lay down the position that it was so held by the common law of the land, notwithstanding the unbounded respect which all who have succeeded him have ever felt and still feel for his learning and ability, we cannot accede to his opinion. If, however, the observation was intended with reference to the civil law or the canon law of Europe, then it is perfectly correct; and that such was the intention of Lord HOLT we think abundantly clear from *Wigmore's* case, which follows the former in the same page of Salkeld, and which was decided three years later than the first. In that case the husband was an Anabaptist, and had a licence from the Bishop

[ \*669 ]

(1) 2 Salk. 437.

REG.  
T.  
MILLIS.

to marry, but married this woman according to the forms of his own religion; *et per* HOLT, Chief Justice, “by the canon law, a contract *per verba de præsenti* is a marriage.”

[ \*670 ]

In HOLT's Reports the expression is precisely the same, “by the canon law;” and Lord Chief Justice HOLT is there made further to say, “In the case of a dissenter married to a woman by a minister of the congregation who was not in orders, it is said that this marriage was not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England to entitle the privileges attending legal marriage, as dower, thirds, &c.” It cannot be supposed that Lord HOLT would limit the observation \*to the canon law, as undoubtedly he did in *Wigmore's* case, if it had been maintainable in the larger and unqualified extent supposed to have been stated by him in the case of *Jesson v. Collins*; and if the latter statement agrees with all the authorities, and the former is not, as we conceive, supported by or consistent with them, we are bound to infer, either that there is some error in the reporter, or that he really meant the proposition to be limited to its more restrained sense.

My Lords, this *dictum* of Lord Chief Justice HOLT is of the more importance because it appears to have been the origin of all the subsequent opinions expressed by different Judges to the same effect. When Sir WILLIAM SCOTT lays it down as the law recognised by the Temporal Courts of this kingdom, he cites this *dictum* of Lord Chief Justice HOLT, which he observes (as he is justified in doing by the report in 6 Modern) was agreed to by the whole Bench. When GIBBS, Chief Justice, makes the same observation, he expressly relies on the authority of Sir WILLIAM SCOTT: *Lautour v. Teasdale* (1). When Lord KENYON makes a similar observation, probably on the same authority, observe how carefully he guards himself: “I think,” he says, “though I do not speak meaning to be bound, that even an agreement between the parties *per verba de præsenti* is *ipsum matrimonium*.” *Reed v. Passer* and others (2). When Lord ELLENBOROUGH lays down the same doctrine in *Rex v. The Inhabitants of Brompton* (3), he is giving judgment in a case of a marriage *per verba de præsenti* celebrated by a priest (though

(1) 17 B. R. 518 (8 Taunt. 830, 832).

(3) 10 B. R. 299 (10 East, 282, 289).

(2) 3 B. R. 696 (1 Peake, N. P. 303).

whether Roman Catholic or Protestant, he says, does not appear); and when he refers to the \*authority of HOLT, Chief Justice, it is clear he considered Lord HOLT to have been speaking of a marriage through the intervention of a priest. It is therefore of very great importance to estimate justly the weight of Lord HOLT's observation, when contrasted with the large field of authorities which has been opened; upon which authorities I have been longer occupied, because the question whereon we are called to answer depends upon the common law of England, of which the ecclesiastical law forms a part.

REG.  
v.  
MILLIS.  
[ \*671 ]

It will be improper, however, to close the discussion of this part of the case without adverting to an argument urged at your Lordships' Bar, upon which some reliance appears to have been placed; namely, the state of the marriages of Quakers (all doubt as to which marriages is now set at rest by the statute passed in 1835) and of Jews.

The argument in substance was this; that as the persons professing the opinions of those respective persuasions celebrated their marriages according to their own peculiar rites, which necessarily excluded the intervention of a person in holy orders, according to the sense which those words are asserted to convey; and as their marriages have been held legal with respect (as it is argued) to all the consequences attending marriage, such as legitimacy, administration, and other civil rights; so the validity of such marriages can only be grounded upon the assumption that a contract of marriage *per verba de presenti* did by law constitute a marriage itself.

Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews amounted to a tacit acknowledgment by the Legislature that a marriage, solemnised with the religious \*ceremonies which they were respectively known to adopt, ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de presenti*; but, on the contrary, the inference is strong, that they were never considered legal. The Legislature, in the statute 6 & 7 Will. III. c. 6, s. 63, enacts, that all Quakers and Jews, and any other persons who should cohabit and live together as man and wife, should pay the duty thereby imposed on marriages, and that upon every pretended marriage made by them they should give five

[ \*672 ]



REG.  
T.  
MILLIS.

days' notice; with an express provision in the 64th section, that nothing in the Act contained should be construed "to make good or effectual in law any such marriage or pretended marriage, but that they should be of the same force and virtue, and no other, as if the Act had not been made." And the case before Lord Hale, to which so much weight was attributed, as conveying his opinion that the marriage was good, appears rather to show his opinion to have been the reverse. He declared "that he was not willing, on his own opinion, to make their children bastards; and gave directions to the jury to find it special:" a declaration which plainly intimates that the inclination of his own mind was that the marriage was not good. We cannot, therefore, think that the case of the Quakers, although certainly one which it is difficult altogether to dispose of, amounts to such a difficulty as to induce us to alter the opinion founded on the authority of the decided cases.

[ \*673 ]

And as to the case of the Jews, it is well known that in early times they stood in a very peculiar and \*excepted condition. For many centuries they were treated, not as natural-born subjects, but as foreigners, and scarcely recognised as participating in the civil rights of other subjects of the Crown. The ceremony of marriage by their own peculiar forms might therefore be regarded as constituting a legal marriage, without affording any argument as to the nature of a contract of marriage *per verba de presenti* between other subjects. But even in the case of a Jewish marriage it was more than a mere contract; it was a religious ceremony of marriage; and the case of *Lindo v. Belisario* is so far from being an authority that a mere contract was a good marriage, that the marriage was held void precisely because part of the religious ceremony held necessary by the Jewish law was found to have been omitted.

I proceed now to refer to certain statutes passed by the Legislature at different times; from various enactments and expressions in which statutes the inference appears to follow, that a mere contract *per verba de presenti* could not at those several times have been generally held to constitute complete marriage.

The statute 32 Hen. VIII. c. 38, for marriages to stand notwithstanding precontracts, in its preamble gives no support to the doctrine, that by the law of England the contract *per verba de presenti* was an actual marriage. It recites the mischief, that after divers marriages have been solemnised and consummated, and fruit of children, "nevertheless, by an unjust law of the Bishop of Rome, which is that upon pretence of a former contract

made and not consummate, the same were divorced and separate ;” and then proceeds to enact, that every marriage, being contracted and solemnised in face of the Church, and consummated, or with fruit of children, shall be \*deemed lawful, good, and indissoluble, notwithstanding any precontract, not consummate, which either party shall have before made.

REG.  
†.  
MILLIS.

[ \*674 ]

The statute 2 & 3 Edw. VI. c. 23, enacts that, as concerning precontracts, “the former statute should be repealed, and be reduced to the state and order of the King’s ecclesiastical laws of this realm” (an expression of no slight importance, when considered with reference to the force within this kingdom of the general canon law of Europe), “which before the making of the said statute were used in this realm ; so that, when any cause or contract of marriage is pretended to have been made, it shall be lawful to the King’s ecclesiastical Judge of that place to hear and examine the said cause, and (having the said contract sufficiently and lawfully proved before him) to give sentence for matrimony, commanding solemnisation, cohabitation,” &c. The language of the Legislature in this Act does surely imply a marked and acknowledged distinction between contract and matrimony. To refer next to the statutes passed relating to the marriages of priests, the 31 Hen. VIII. c. 14, punishes with death any priest who shall carnally keep or use any woman “to whom he is or shall be married, or with whom he hath contracted matrimony ;” thus assuming the contract to be one thing, actual matrimony to be another, although visiting both offences with the same measure of punishment.

The statute 12 Chas. II. c. 33, intitled “An Act for Confirmation of Marriages,” enacts, “that all marriages had and solemnised after a certain day before any justice of the peace, shall be adjudged and taken to be of the same and of no other force and effect as if such marriage had been had and solemnised \*according to the rites and ceremonies established or used in the Church or kingdom of England.” It is true that that Act is declared to be passed “for the preventing and avoiding all doubts and questions touching the same ;” but as the Act or Ordinance referred to contained a form of contract *per verba de presenti* of the most accurate and precise description, and before witnesses, it affords ground to infer that a contract of that nature had not, in the general opinion, the force of an actual marriage : and observe how very strong the inference is from the proviso. “that issues on the point of bastardy or

[ \*675 ]

REG.  
v.  
MILLIS.

lawfulness of marriage, depending on these marriages, should be tried by a jury." Why not let them go to the Ecclesiastical Court, as before, if by the law of that Court the contract *per verba de presenti* was held an actual marriage without any religious ceremony?

The statute 7 & 8 Will. III. c. 35, passed to enforce the laws which restrain marriages without licence or banns, had for its object the levying a revenue by the stamps imposed by a former Act upon licences of marriages. For this purpose it lays a penalty of 10*l.* by the fourth section, "on every man so married without licence or publication of banns as aforesaid;" that is, upon reference to the preceding clause, "married by any parson, vicar, curate, or other minister as their substitute." If the Legislature had thought a contract *per verba de presenti* before any person not being in holy orders was a valid marriage, it surely would not have left the remedy so defective, but would have enacted that every man married without a licence shall be made liable to the penalty.

[ \*676 ]

The statute 10 Anne, c. 19, is an Act for raising money for the use of the kingdom; and in section 176 provision is made to prevent the great loss of duties \*on marriage licences which had been sustained by the frequency of clandestine marriages. The provision is, that every parson, vicar, or curate, or other person in holy orders, who shall after a certain day marry any person in any church or chapel, or in any other place whatsoever, without publication of banns, or without licence first had from the proper Ordinary for such marriage, shall forfeit 100*l.* Would this penalty have been limited to the case of marriage by a person in holy orders, if it had been conceived by the framers of the Act that a contract *per verba de presenti* alone, without the aid of the priest, had constituted a complete marriage? The inference arising from these Acts is not certainly so very strong, but whatever inference can be drawn has a tendency to support the opinion at which we have arrived.

The various Acts of Parliament which have been passed from time to time, and which have been referred to in the course of the argument, imposing penalties on the solemnisation of marriages by Roman Catholic priests in Ireland, between Protestants, or between a Protestant and a Roman Catholic, and nullifying such marriages, are founded in good sense, and with a view to attain a definite object, upon the supposition that the presence of a priest

is necessary to make the marriage good, and upon that supposition only ; but they are a mere dead letter, if the contract *per verba de presenti* without the priest makes the marriage. And if this is no proof, as perhaps it is not, that such was necessarily the law, it is at least a proof that it was the prevailing general opinion, both amongst the people and the Government, that by law the presence of the priest was essential to the contract.

REG.  
MILLIS.

But upon referring, in the last place, to the statute 26 Geo. II. c. 33, the Act for the better preventing \*clandestine marriages, it will be found that the provisions thereof throw a stronger light upon the subject. If a contract *per verba de presenti* had been considered by the Legislature as "*ipsum matrimonium*," one would have expected that all such contracts made after the Act came into force, if not made illegal, would at least be declared null and void. There could have been no more effectual mode of suppressing clandestine marriages ; but there is no such enactment. The only clause that affects these contracts is the 13th, which enacts only "that no suit or proceeding shall be had in any Ecclesiastical Court in order to compel a celebration of any marriage *in facie ecclesiæ*, by reason of any contract of matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*, which shall be entered into after the 25th March, 1754." These contracts *per verba de presenti* are still, therefore, lawful, though they cannot be enforced in an Ecclesiastical Court. If these contracts did not before and at the time of passing the Act constitute a valid marriage, but were only the necessary means, the basis, for enforcing the solemnisation, there is then no injury in leaving them as they were ; but if they ever constituted a valid marriage of themselves, not being made null by the Act, so do they still ; and then may some great and almost inextricable difficulties occur from the absence of such provision.

[ \*677 ]

Before the passing of the Act, and indeed since, put the case that A. made a contract of marriage *per verba de presenti* with B., and then, in the lifetime of B., marries C. *in facie ecclesiæ*, and that he has children at the same time both by C. and B. ; B. dies ; are the issues of both legitimate ? It is clear from the decisions, that the issue of A. and C. are legitimate ; \*and if the argument on the part of the Crown, that the contract with B. makes the marriage, be well founded, the issue of B. is legitimate also. Suppose two sons, born at the same time, one from each mother, a possible event, which is the eldest son and heir ? This and

[ \*678 ]

REG.  
r.  
MILLIS.

many more cases of difficult solution may be put, if the contract *per verba de presenti* was by the English law held to be actual marriage; and from these considerations arises the necessary inference that it was not; and thus do arguments from the enactments of the Legislature combine and agree with the authority of the decided cases, to prove that such never was the law of England.

My Lords, I proceed, in the last place, to endeavour to show that the law by which the Spiritual Courts of this kingdom have from the earliest time been governed and regulated is not the general canon law of Europe, imported as a body of law into this kingdom, and governing those Courts *proprio vigore*, but, instead thereof, an ecclesiastical law, of which the general canon law is no doubt the basis, but which has been modified and altered from time to time by the ecclesiastical Constitutions of our Archbishops and Bishops, and by the Legislature of the realm, and which has been known from early times by the distinguishing title of the King's Ecclesiastical Law. And if it shall appear, upon reference to this law, that there is no incontrovertible authority to be found therein that marriage was held to be complete before actual celebration by a priest, the absence of such direct authority in the affirmative is sufficient to justify us in drawing the conclusion already formed, that the contract alone is not by the law of England the actual marriage. The result, however, of a somewhat hasty consideration of the authorities upon this \*question (for the due research into which we were anxious to have obtained a longer time) appears to us to be, that no such rule obtained in the Spiritual Courts in this kingdom.

[ \*679 ]

It would scarcely have been necessary to have entered upon this part of the discussion, had it not been for the observations made by Sir WILLIAM SCOTT, in the case of *Dalrymple v. Dalrymple*. That very learned Judge, after laying down in his deservedly celebrated judgment in that case, that marriage is a contract of natural law and of civil law also, proceeds to observe, " that when the natural and civil contract was formed, the law of the Church, the canon law, considered it had the full essence of matrimony without the intervention of the priest;" which canon law is then stated by that eminent Judge to be " the known basis of the matrimonial law of Europe." The observation upon which so much reliance has been placed by the counsel for the Crown then follows: " that the same doctrine is recognised by the Temporal

Courts as the existing rule of the matrimonial law of this country;" although certainly the observation is in some degree qualified by the expression, "that the common law had scruples in applying the civil rights of dower and community of goods, and legitimacy, in the cases of these looser species of marriage."

RUG.  
C.  
MILLS.

My Lords, as we have already stated, in the opinion we have given, that we do not conceive it to be part of the law of the Temporal Courts that "when the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest," it is only proper to state, in the first place, that the entertaining, as we do, a different view of this subject from that eminent Judge, does not in any \*manner whatever break in upon the authority of the decision in the case of *Dalrymple v. Dalrymple*.

[ \*680 ]

The doctrine of the Temporal Courts in England had no bearing at all upon a question which was to be decided solely by the law of Scotland; which country, it is well known, differs materially from ours in many of its legal institutions, and in none more pointedly than those which relate to marriage and legitimacy. Again, it was of no importance in that case whether the canon law of Europe was introduced into England as part of the law of the land; the only question necessary for the decision of the case then before the Court being, whether such canon law was introduced or not into the law of Scotland. The opinion, therefore, of that eminent person, so far as regards England, was uncalled for and extrajudicial; and upon that ground the question before us must be considered as unfettered by the weight of such great authority, and open to the most free discussion.

But that the canon law of Europe does not, and never did, as a body of laws, form part of the law of England, has been long settled and established law (1). Lord HALE defines the extent to which it is limited very accurately. "The rule," he says, "by which they proceed is the canon law, but not in its full latitude, and only so far as it stands uncorrected either by contrary Acts of Parliament or the common law and custom of England; for there are divers canons made in ancient times, and decretals of the Popes, that never were admitted here in England" (2).

Indeed the authorities are so numerous, and at the same times so

(1) This passage is cited by BLACKBURN, J., and Lord CHELMSFORD, L. R. 3 H. L. 17, 35, 46.  
(2) Hale's Hist. of Comm. Law, *Bishop of Exeter v. Marshall* (1868) c. 2.

REG.  
v.  
MILLIS.  
[ \*681 ]

express, that it is not by the Roman canon law that our Judges in the Spiritual Courts \*decide questions within their jurisdiction, but by the King's ecclesiastical law, that it is sufficient to refer to two as an example of the rest. In *Caudrey's* case (1), which is intitled "Of the King's Ecclesiastical Law," in reporting the third resolution of the Judges, Lord COKE says, "As in temporal causes the King, by the mouth of the Judges in his Courts of Justice, doth judge and determine the same by the temporal laws of England, so in cases ecclesiastical and spiritual, as, namely," (amongst others enumerated) "rights of matrimony, the same are to be determined and decided by ecclesiastical Judges according to the King's ecclesiastical law of this realm;" and a little further he adds, "So, albeit the Kings of England derived their ecclesiastical laws from others, yet so many as were proved, approved, and allowed here, by and with a general consent, are aptly and rightly called 'The King's Ecclesiastical Laws of England.'" In the next place, Sir JOHN DAVIES, in "*Le Case de Commendams*" (2), shows how the canon law was first introduced into England, and fixes the time of such introduction about the year 1290, and lays it down thus: "Those canons which were received, allowed, and used in England, were made by such allowance and usage part of the King's ecclesiastical laws of England; whereby the interpretation, dispensation, or execution of those canons, having become laws of England, belong solely to the King of England and his magistrates within his dominions:" and he adds, "Yet all the ecclesiastical laws of England were not derived and adopted from the Court of Rome; for long before the canon law was authorised and published" (which \*was after the Norman Conquest, as before shown), "the ancient Kings of England, viz. Edgar, Athelstan, Alfred, Edward the Confessor, and others, did, with the advice of their clergy within the realm, make divers ordinances for the government of the Church of England; and after the Conquest divers provincial synods were held, and many Constitutions were made in both the kingdoms of England and Ireland; all which are part of our ecclesiastical laws of this day."

[ \*682 ]

We therefore can see no possible ground of objection to the inquiry, whether before the introduction of the canon law any law existed upon the subject of marriage differing from that of the canon law, and not afterwards superseded thereby; and when we

(1) 5 Co. Rep. 1.

(2) Sir J. Dav. 69 b, 70—72 b.

find, in the collection of ancient laws and institutes of England published by the Commissioners of Public Records, amongst the laws of Edmund, one which directs that at the nuptials there shall be a Mass-priest by law, who shall, "with God's blessing, bind the union to all prosperity," we can see no more ground to doubt the existence of this law (which does not now make its appearance for the first time, but was published by Wilkins (1) in the last century) than any other document of antiquity which has been received as genuine without hesitation.

REG.  
F.  
MILLIS.

The Council held at Winchester in the time of Archbishop Lanfranc, in the year 1076 (2), contains a direct and express authority with a nullifying clause, that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. Numerous Councils follow, in which are decrees to prevent and \*punish clandestine marriages, but in no one of which is there any repeal, express or implied, of the rule laid down by the first; viz. that the presence of the priest is necessary to constitute a legitimate marriage; but the time of the marriage by the priest, the place where it is to be celebrated, and other regulations, are prescribed, in order to meet the evil which was then existing. That the marriage, though called clandestine, was still a marriage celebrated by a priest, and so assumed to be, is placed beyond all doubt by the 11th Constitution of Archbishop Stratford, established by the Council of London (3): "De celebrantibus matrimonia clandestina in ecclesiis oratoriis vel capellis." That Constitution recites in effect, that people left their own places of residence, where the impediments to their marriage were notorious and their parish priests not disposed to solemnise their marriage, and betook themselves to populous places where they were unknown, in order that "aliquoties in ecclesiis aliquando in capellis seu oratoriis matrimonia inter ipsos de facto solemnizari procurent." What is this but a plain assumption that the marriage so celebrated, was celebrated by a priest? for surely none others but persons in holy orders could celebrate them in churches, chapels, or oratories.

[ \*683 ]

The authority of John de Burgo, a dignitary of the Church of England, was much relied on, as a direct proof that a contract *per verba de presenti* was sufficient to constitute complete matrimony,

(1) See Wilkins' Concilia, 367.

(3) Johnst. Ecc. Law, A.D. 1343,

(2) Johnst. Ecc. Law, A.D. 1076, s. 11; 2 Wilkins' Concilia, 706.



REG.  
T.  
MILLIS.

[ \*684 ]

without the presence or intervention of a priest. The materials of his work, bearing the quaint title of *Pupilla Oculi*, were compiled in 1385, and the work itself printed at Paris; but afterwards, in the year 1400, \*an edition was printed in London, "*Omnibus presbyteris precipue Anglicanis summe necessaria.*" The work contains, amongst other things, a treatise on the Administration of the Seven Sacraments; and under the head "*De sacramento matrimoniali*" occurs the passage relied on by the Crown. The author lays it down, "Of the minister of this sacrament it is to be observed, that no other minister is to be required distinct from the parties contracting; for they themselves for the most part minister this sacrament to themselves, either the one to the other, or each to themselves." And a little further he adds, "Scotus says, that to the conferring of this sacrament there is not required the ministry of a priest, and that the sacerdotal benediction which the priest is wont to make or utter upon married people, or other prayers uttered by him, are not the form of the sacrament nor of its essence, but something sacramental pertaining to the adorning of the sacrament." From this passage it is clear that, whether absolutely necessary or not, it was at least usual and customary at that time to make the contract before the priest. It appears further, from the first words of the following chapter, "*De matrimonio clandestino,*" that such course was ordered by the Church: "*Inhibitum est contrahere nuptias occulte, sed publice, coram sacerdote, sunt nuptiæ in Domino contrahendæ.*" If, therefore, in the passage above cited, the author intends to express thus much only, and no more, viz. that by the contract *per verba de presenti*, made privately between themselves, that mysterious sacrament of which he is speaking has been taken by them which makes the contract indissoluble and capable of being enforced by either against the other *in facie ecclesie*, such doctrine is admitted to be consistent with the \*ecclesiastical law received in England; but if it is supposed to mean more, if it is held up as an authority that the marriage is complete for all civil purposes of legitimacy, dower, and other civil rights, then, before we accede to the proposition, it is the safer course to discover, if possible, whether the doctrine of the text writer is or is not consistent with the recognised laws and Constitutions of the Church of England then in force, and with the course and practice of the Ecclesiastical Courts of England at that time; and in case of a discrepancy between them, to reject the authority of the text writer,

[ \*685 ]

and to adhere to that of the recognised law and the practice of the Courts; for there is no surer evidence of the law in any particular case than the course and practice of the Courts in which such law is administered. We should treat the best of our text writers, Sir William Blackstone, for example, precisely in the same way.

REG.  
v.  
MILLIS.

Now, at the time of the publication of John de Burgo, and of the other work, intitled "Manipulus Curatorum," cited for the same purpose, there stood, unrepealed by any subsequent Constitution of the Church, both the Constitution of Lanfranc, before stated, and the subsequent Constitutions of the Church against clandestine marriages: the former directly declaring the presence of the priest at the marriage to be necessary to give it validity; the latter implying such necessity. I ask whether the Courts of Ecclesiastical Law of England would take the law, if the very point in controversy was brought before them, from the text writers of the day, or from the Constitutions of the Church? I doubt not, however learned or in whatever estimation the text writers might be, it would be from the law of the Church; and as to the course \*and practice of the Courts of Ecclesiastical Law in respect to a matrimonial suit to enforce marriage upon a contract *per verba de presenti*, the prayer upon the libel has been, not to pronounce that the parties are already actually and completely married, but that it may be pronounced "for the validity, full force, and strength of the said contract of marriage, to all effects and intents in law whatsoever and that the defendant may be compelled to solemnise the said marriage in the face of the Church" (1): just as in *Bunting's* case, before cited, the decree was not that Agnes was married, but that Agnes "*matrimonium subiret*."

[ \*686 ]

And when reference is made to Oughton (2), the same appears more distinctly to be the form of proceedings; and it would be most singular, if the contract *per verba de presenti* was considered by the Court as an actual complete marriage, that a provision should be made for the Court to inhibit the party, "*pendente lite*, from contracting matrimony, or procuring matrimony to be solemnised." If the Court held the first marriage to be entirely complete, surely the statute of James, which had then been passed more than a century, and which made the second solemnisation a felony, would have been a surer protection than the inhibition of the Court. But the necessary inference is, that the Court could not have so

(1) Clerk's Instructor, 326.

(2) Vol. 1, 283.

REG.  
c.  
MILLIS.

held the effect of the contract; and it follows, therefore, that the authority of the passages above cited cannot be safely relied on, against the Constitutions of the Church and the practice of the Spiritual Court.

[ \*687 ]

We now pass to the consideration of the particular circumstances involved in the first question proposed \*by your Lordships, which supposes this marriage to have taken place in the house and in the presence of a placed and regular minister of the congregation of Protestant dissenters called Presbyterians.

As we have already stated our opinion, that to make the marriage a complete marriage, it must be solemnised in the presence of a minister in holy orders, it is only necessary to look back to the time when that law first obtained in England to enable us to answer that question without difficulty.

At the early period when such law arose, and down to a comparatively recent period, the expression priest, curate, minister, deacon, and person in holy orders, which are the words met with in the different Constitutions and Councils and authorities bearing on the subject, could point to those persons only who had received episcopal ordination; there were no others known at all; all but they were laymen: and unless some Act of the Legislature has interposed its authority, and given the Protestant dissenting minister in Ireland the same power for this purpose as the persons in holy orders did before possess, we think the entering into the contract in his presence cannot, in the legal sense of the word, be held to be entering into it in the presence of a person "in holy orders." Now no statute has been brought forward, except the 21 & 22 Geo. III. c. 25 (Irish); but the operation of that statute is limited to matrimonial contracts or marriages between Protestant dissenters, and solemnised by Protestant dissenting ministers or teachers; and as your Lordships' question goes on to state that one of the contracting parties in this case is not a Protestant dissenter, but a member of the Established Church of England and Ireland, it follows that the case does not fall within that statute, and \*that it must be decided as if that statute had never been passed.

[ \*688 ]

My Lords, the two subsequent conditions or circumstances contained in your Lordships' question can obviously make no difference. The form of the religious ceremony cannot, upon any principle or upon any authority, compensate for the want of the presence of the proper minister, assuming such presence to be

necessary; nor can the circumstance of subsequent cohabitation carry the validity of the marriage higher than the original force of its obligation.

REG.  
v.  
MILLIS.

The main and principal point, however, of your Lordships' first question still remains to be answered; viz. whether, after such a contract entered into between A. and B., whether A., by marrying C. in England whilst B. is still living, commits the crime of bigamy?

And after the full discussion of the general question, and our opinion already declared, that the first contract does not amount to a marriage by the common law, it is hardly necessary to say that we hold the offence of bigamy has not been committed. Indeed, independently altogether of the answer we have given to that abstract question, and admitting, for the sake of argument, that the law had held a contract *per verba de presenti* to be a marriage, yet, looking to the statute upon which this indictment is framed, we should have thought, upon the just interpretation of the words of that statute, the offence of bigamy could not be made out by evidence of such a marriage as this. The words are, "If any person, being married, shall marry any other person during the life of the first husband or wife;" words which are almost the very same as those in the original statute of James I. Now the words "being married," in the first clause, \*and the words "marry any other person," in the second, must of necessity point at and denote marriage of the same kind and obligation. If, therefore, a marriage *per verba de presenti*, without any ceremony, is good for the first marriage, it is good also for the second; but it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counterpleaded) the man who had in each instance entered into a contract *per verba de presenti*, and nothing more. Waiving, however, that consideration, it is enough to state to your Lordships, as the answer to the first question, that in our opinion A. did not, under the circumstances therein stated, commit the crime of bigamy.

[ \*689 ]

My Lords, we have so fully and pointedly answered the second question proposed by your Lordships, in stating the grounds of our first answer, that it is unnecessary to trouble you with any further observation thereon, except that as the statute of 58 Geo. III. c. 81, has enacted that no suit shall be had to compel the celebration of such a contract in any Ecclesiastical Court in Ireland, we think this question also should be answered in the negative.

In conclusion, I would only observe, that, although I am authorised

REG.  
v.  
MILLIS.

to state that our opinion on the questions proposed to us is unanimous, yet I ought to add that my learned brethren are not to be held responsible for the reasoning upon which I have endeavoured to establish the validity of that opinion.

[Lord BROUGHAM, Lord LYNTHURST, and Lord CAMPBELL made some observations in moving that the opinions of the learned Judges be printed. It is not thought necessary to reproduce these, except the following statement of Lord CAMPBELL's:]

- [ 697 ] My Lords, the opinion delivered by the learned Judges is entitled to be received with the most profound respect: at the same time, your Lordships are well aware that you are not bound by it. You have the great advantage of consulting the learned Judges, and asking for their opinions upon any matter of law that arises in the performance of your functions, either as Judges or as legislators; and to the opinions of the learned Judges you will always pay the most profound respect, and the strongest presumption arises that what \*they declare to be the law, is the law. But still, when you are to decide as Judges, you must decide upon your own opinion; you must conscientiously believe that the law is that which you pronounce it to be.
- [ \*698 ]

1843.  
Aug. 10.

LORD BROUGHAM :

[ 699 ]

The opinion delivered by the LORD CHIEF JUSTICE of the Common Pleas, on behalf of the Judges his learned brethren and himself, has received, as it well deserved, the greatest attention from your Lordships; and it now remains that such of us as have made up our minds on the subject, should express the sentiments which we entertain, after profiting by a deliberate consideration of the arguments used to explain and enforce the conclusion that the Judges have arrived at.

In discharging a duty which would be incomparably more easy and less ungrateful could I agree with those learned persons, I must be permitted, in the first place, to express my regret if the course taken by me, with, I believe, the general concurrence of your Lordships, of urging the giving an answer to our questions before this session should close (1), shall be found to have occasioned

(1) His Lordship had on the 19th of June, immediately after the Judges delivered their opinions in the *M'Naghten* case (*ante*, p. 85), expressed his earnest desire that,

previously to leaving town for the circuits, they would lay before the House their answers to the questions proposed to them in the present case.

the Judges any inconvenience, or precluded the fullest consideration of the important matters submitted to them.

REG.  
F.  
MILLIS.

I must be allowed to say how deeply I lament the peculiar form in which the assistance of the learned Judges has been tendered to us. The opinion purports to be unanimous; but the more important matter of the reasons urged to support it, would not seem to be thus represented. And although in ordinary circumstances this would be of little moment, in the present case there is a fact stated which gives it great importance indeed. Affirming the difficulty of the subject; confessing "that it is involved in still \*deeper obscurity now than in former times, when one great authority declared that the law lay very loose regarding things naturally essential to marriage, and others expressed themselves with considerable uncertainty upon it;" the learned Judges "acknowledge themselves unable to trace or define, with absolute certainty, the boundary of marriage itself;" that is, the whole matter in dispute. Nor is this all. We are told that some of those learned persons, how many we are not told, at one time "felt considerable fluctuation and doubt," after the argument at our Bar, and only "acceded to the opinion of the majority" upon grounds which are not given with a convenient, or indeed with any certainty; for it is distinctly stated, that the CHIEF JUSTICE alone is to be understood as giving the reasons for an opinion in which all concur, but concur upon various grounds, some of which, alone, it is probable, are laid before us; nay, none of which may very possibly be given.

[ \*700 ]

Now it is to be observed, that the opinions of the learned Judges are resorted to by your Lordships, not to decide the question before you, but to give you information, suggestions, and, generally speaking, assistance in forming your own. It therefore becomes necessary that their reasons should accompany those opinions, and accordingly they are, by the course of your Lordship's proceedings, and, indeed, by your orders, invariably required. If, indeed, any difference were to be made in the value which we attach to the opinions and to the reasons, we should certainly regard the reasons as the more valuable of the helps which we thus derive from those learned persons. Nothing, therefore, can be more a matter of regret than the circumstances to which I have, in the outset of my argument, deemed it fitting that I should advert. \*But, at the same time, that circumstance is so far a matter of gratulation to me, that it somewhat lessens the difficulties under which I labour in expressing an opinion at variance with theirs.

[ \*701 ]

REG.  
v.  
MILLIS.

In approaching the very important question now before your Lordships, the first consideration that we find raised by the opinions of the learned Judges is, that they have declared all marriages void, and absolutely void, which are not solemnised by a clergyman or person in holy orders, in those parts of the British dominions to which the Marriage Act (26 Geo. II.) does not extend. Therefore, wherever the English law prevails, in all our numerous colonies to which no remedial Act has been applied, every marriage celebrated without a parson is void, and the issue are bastards. But this is not all; the same is equally true of all marriages contracted by those persons in this country who are expressly exempted from the operation of Lord Hardwicke's Act. Thus, all marriages of Jews and Quakers before the legalising Act of 1835-6 are absolutely void; and it follows that every Jew and every Quaker, the issue of such marriages, that is, every Jew and every Quaker now living and above eight years of age, is a bastard: and, furthermore, it is another consequence of this doctrine, that every pedigree, any link of which depends upon the legitimacy of any Quaker or any Jew, or any person born of a colonial marriage at which no priest assisted, becomes wholly imperfect, because no title can be made under it. Thus, if any purchase has been made, and a claim is preferred under it, and the title of the vendor has to be traced through any Jew or any Quaker, or any person the issue of a colonial lay marriage, the purchaser's title is gone, and none can \*take or can hold under it, although the full consideration has been paid, and the title in all its other parts is complete. I am, of course, assuming that the flaw has not been removed by the lapse of time letting in the Statute of Limitations.

[ \*702 ]

It is, no doubt, certainly true, that incorrect or even dangerous consequences, furnish no argument against a proposition which is consistent with itself and with undeniable principle, and supported by unquestionable authority; but it is at least as certainly true, that when any proposition leads to perilous consequences, and when its practical enforcement would bring on such mischiefs, we are called upon to scrutinise the foundations on which it rests, with a caution and a jealousy proportioned to the evils resulting from its adoption. We are bound only to admit it when we have no choice and no escape; when, pressed by arguments which the more we examine them, appear the more irrefragable, the necessity of yielding is plain; when (all the reasons commanding our assent) nothing remains but to declare the law, and leave the remedy, whether by

prospective or retrospective acts of power, to the lawgiver himself. The view of such consequences affords the best possible reason for being slow, and even reluctant, to yield our assent, and for admitting nothing without the closest scrutiny. I shall afterwards show that those consequences of inconvenience or danger, point in another way to a support of a doctrine encumbered by no such evils. Keeping, however, the considerations in view to which I have adverted, let us proceed to that examination which those considerations require to be most full and minute.

REG.  
v.  
MILLIS.

It is necessary to begin by inquiring what is really \*meant by a contract of marriage, or the contracting of marriage, within the limits and scope of the present argument. We clearly do not thereby intend a contract in the more ordinary sense, the more general acceptance of that word; we do not mean a contracting, an engaging, or bargaining to marry; such a contract is a mere article and condition of a marriage to be afterwards had; it is to this subsequent actual marriage that the term "contract" is applied in the present argument, and not to any mere mutual promise or engagement to marry; such promise or engagement is a promise or engagement to contract a marriage. Now, all admit, and the opinions of the learned Judges pronounce the marriage contract thus designated, to be one of a very peculiar kind; for whether it is to be regarded as *ipsum matrimonium* or not, they describe it as perfectly indissoluble; neither party can repudiate it or withdraw from it; neither party can release it; neither party can renounce for himself the stipulation, or let the other free from the obligation; both together are so absolutely bound, that both together cannot put an end to the mutual obligation thus contracted towards each other.

[ \*703 ]

Such being the nature of the contract, we first ask how it comes to be called by a name which in all other cases signifies something so entirely different? What other contract is unreleasable? What other has this perpetual and enduring force? The answer is plain: there is a contract, and a contract in the ordinary sense of the word; the parties contract to take each other for husband and wife, to live together as such, and to perform the duties of that relation. If they contract to marry at a future time, it is a common contract to do something hereafter; that something \*is to contract a marriage, that is, to contract with each other to live together as man and wife; the former contract is executory and releasable and dissoluble by mutual consent; the latter is executed, unreleasable, and indissoluble.

[ \*704 ]



REG.  
v.  
MILLIS.

We next ask how such a contract as this can be said not to be perfect as soon as made, or to have any reference to the future, or to contemplate any further operation for its perfection, or to require any further act towards its completion? How can it be made more lasting than by being perpetual? How can it be made more firm than by being placed beyond the power of the parties and of all mankind? How can it be made more binding than by being wholly indissoluble? The imagination is lost in its endeavours to fancy any one attribute that can be added, any one quality that can make the nature of this contract more ample, or its obligations more stringent.

But we hear mention made of proceedings in the Ecclesiastical Courts to enforce a performance, as it is called, of this contract. Let us not be deceived and led away by sounds. No Court has now the jurisdiction to compel a performance of a marriage contract, if by that is meant to compel a marriage where parties have agreed, have mutually promised, to marry. At all times this contract was put an end to by a subsequent marriage of either party. Accordingly these Courts only interfere where the marriage contract has been *per verba de presenti tempore*; and the libel always pleads that fact as the foundation—the necessary foundation—of its demand to have a sentence requiring something further to be done. What is that something? Do these Ecclesiastical Courts assume the power of compelling parties to do something more, \*who had already contracted a marriage *de presenti*? In two respects they certainly used to do so; in one of these respects they do so still, in the other they did so till prohibited by the Legislature. They could compel the parties to perform the contract and fulfil their engagement of living together as man and wife, for they could give restitution of conjugal rights to the party complaining against the party refusing thus to perform his engagements, and this they still do; but they could also do that which was certainly in its origin an usurpation,—they could compel the parties who had contracted the marriage civilly, to clothe their civil contract with religious ceremonies, by solemnising in the face of the Church, a marriage contracted, that is, made without the intervention of the Church or its ministers.

That this solemnisation could add nothing to the force of the contract, or the rights of the parties under it, is clear; because if it were necessary to perfect the contract, or to make those rights vest completely, we are left in total inability to conceive what the

contract was during the interval between the making of it civilly and its alleged completion ecclesiastically. How could parties be bound indissolubly and perpetually, and yet be bound to do nothing? How could such obligations and such stipulations possibly remain suspended, as regards all the things contracted to be done, and yet in full binding force as to the impossibility of the obligations being determined? If the contract was indissoluble, it must be to do something; it was utterly absurd to hold that the parties were indissolubly bound to do nothing.

REG.  
C.  
MILLIS.

But if the only reasonable way of getting over this formidable difficulty be resorted to; if it be said that \*the contract made without a priest, is only a contract afterwards to make one with a priest; the answer is at hand, and it seems irrefragable. There is no difference whatever, not in a single iota, in the contract alleged to be imperfect and that alleged to be complete. A contract to sell an estate is executory, because it binds the party to do some ulterior and different act; a contract to marry afterwards is executory in like manner; but a contract whereby parties take one another for husband and wife is only a contract to live as such, and it is identical with the same contract repeated before a priest, and with his aid. So if I contract to sell an estate and refuse to do so, a court of equity will compel me, that is, will compel me to perform the special thing which I had engaged to do. When I contract to marry, neither a court of equity nor a Court Christian can compel me to perform by marrying; when I contract a marriage, that is, contract to live as man with a wife, I may be compelled so to do; but the Court might also, till the law was changed, compel me to perform the same identical contract over again in another manner, not compelling me to do anything different from that which I had already done, but only compelling me to clothe what I had done informally, with proper formalities. The object of these formalities was something wholly foreign to the validity of the contract already executed, and had no force to improve its binding nature. It was to appease the conscience of parties who had neglected a religious observance; it was to give that which had been irregularly though bindingly done, a regular form and aspect; it was to reconcile the parties with their clerical guides; it was also to maintain the authority of those guides; it was finally, peradventure \*primarily, to augment the emoluments of those guides.

[ \*706 ]

[ \*707 ]

Although, in order the more effectually to keep possession of the authority over marriage which they thus grasped, the churchmen

REG.  
v.  
MILLIS.

were sometimes inclined to treat the civil contract as void in some respects, yet they for the most part held it binding; but they endeavoured to accomplish the same purpose by holding in some instances that any subsequent marriage was only voidable and not void. They never seem to have denied the validity of the first in most respects: thus they admitted that whoever had contracted such merely civil or irregular marriage, might cohabit without committing the sin of adultery; they always held that if either party cohabited with another person, the intercourse was adulterous. They never doubted that a second marriage contracted by either, standing the first, was unlawful; they only said it was voidable by suit in one of their own Courts rather than null and void in itself. Now this distinction, clearly taken with the view of performing what is said to be the office of a good Judge, *ampliare jurisdictionem*, is plainly proof of the first marriage being valid, else why was the second to be declared void by sentence of any Court? The first might have been solemnised irregularly and without a priest, the second regularly and with a priest's intervention; yet the second was declared void by sentence of the Ecclesiastical Court, on the ground that the first marriage, though irregular and merely civil or lay, was yet valid, and had all the essentials of a binding contract, a contract executed: on no other conceivable ground could the second marriage be declared unlawful and void, by any sentence of any Court.

[ \*708 ]

It is, however, equally clear that this contract may \*be entered into by the parties so as to be in some sort merely executory; they may marry civilly, with an intention that there shall afterwards be a religious ceremony or solemnisation performed, a regular marriage celebrated as it were in face of the Church. Such a contract, the first made contract, being by consent of the parties made to depend for its validity on the subsequent religious solemnity, although it may still be indissoluble, may also be incomplete until the event contemplated occurs to give it perfection. Such a marriage may justly be termed imperfect, and only completed by the religious celebration. I beg the attention of your Lordships to this distinction, which the learned Judges appear to have overlooked; because I really venture to think it solves many of their doubts, and explains the cases on which they rely. Be it ever borne in mind that I do not say all marriages are valid where *verba de presenti* are used. Those marriages only are so where the force and effect of the *verba de presenti* are to bind the parties by

this contract, without reference to or contemplation of any future ceremony. If the parties plainly contemplate a future solemnisation, and only bind themselves in the event of that taking place, then their contract is executory and conditional, not executed and absolute. It is like a contract or agreement to grant a lease, which may, according to its frame and to the circumstances, be a lease or only an agreement, according as the words amount or not to a present demise.

REG.  
MILLIS.

These considerations may clear away the difficulties which have been conjured up to encumber the ground of this argument. For, in the first place, they furnish a decisive answer to the objection, which has weighed with many, that they who maintain the \*validity of a marriage *per verba de præsenti* must allow the possibility of two valid marriages subsisting at one and the same time. Now this is manifestly impossible by the whole scope of our contention; for the first marriage being valid, we of course hold the second void; nay, it is voidable even by the opposite argument. They also deny the validity of the first, only contending that the second cannot be set aside without a sentence. They admit the first to be valid, at least to the effect of precluding a subsequent marriage; we hold it absolutely valid, and the second absolutely void.

[ \*709 ]

In the next place, the positions which have been laid down seem satisfactorily to explain some of the cases most chiefly relied on by those who support the judgment below, and mainly by the learned Judges in their argument. It is said, that if the marriage *per verba de præsenti* was complete without more, then the Court Christian would declare it to be so by its sentence, and require no further celebration: and the distinction is taken between a Scotch marriage, as in *Dalrymple v. Dalrymple* (1), and a Sicilian one, as in *Herbert v. Herbert* (2). In the former no further solemnisation is ordered; in the latter "the contract is declared valid to all intents and purposes, and therefore, the parties are decreed to solemnise it in the face of the Church." But the Scotch marriage is decreed valid, and no additional celebration is added; because the only defect of an irregular marriage in Scotland is that it incurs the censures of the Church, from which a celebration *in facie ecclesiæ* in England could not relieve the parties; and the secular marriage is not proved to be of more force and effect than a \*similar marriage in this country, and therefore, the solemnisation is ordered, as it would have been, before the Marriage Act, if the contract had been made in England.

[ \*710 ]

(1) 1 Hagg. Cons. Rep. 54.

(2) 2 Hagg. Cons. Rep. 263; 3 Phill. 58.

REG.  
v.  
MILLIS.

The reason, and the manner of so ordering it, is clearly shown by the prayer of the libel, and the sentence as cited from the book of practice called "The Clerk's Instructor" (1). After setting forth a marriage *per verba de presenti*, the libel asks for a decree that it is of full force and effect to all intents in law whatsoever; and it adds these words, "and also that the said A. B. may be compelled, constrained, and ordered to solemnise the said marriage in the face of the Church;" and the sentence is accordingly. For when Sir GEO. LEE, in *Baxter v. Buckley* (2), says, "I gave sentence for the contract," this is what he intends; and he adds, that he also enjoined Buckley to solemnise it in the Church with Baxter within sixty days: there can be nothing stronger than the inference from this manner of pleading. Had the contract only been executory, and the marriage itself had consisted in the celebration *in facie ecclesiæ*, the libel would plead that, in respect of such contract, A. B. should be ordered to celebrate a marriage. But it says only, that "a true, pure, and lawful marriage had been contracted," and requires this to be declared: and "also that A. B. be ordered," not to celebrate a marriage, that is, a marriage not already had, but "to solemnise *in facie ecclesiæ* the said marriage," that is, the marriage already had, but not had *in facie ecclesiæ*.

[ \*711 ]

I observe that the learned Judges, in endeavouring to evade the force of the decision in *Bunting v. Lepingwell* (3), \*rely upon the words of the decree, "*quod predicta Agnes subiret matrimonium cum prefato Gulielmo.*" Clearly this is only the solemnisation for order and regularity's sake. But I perceive much stress is laid upon the word "*fore*," as in the future tense; and it is contended, that the first imperfect marriage being only perfected by the solemnisation ordered to be made, the second was adjudged to be void, or become so upon that solemnisation being made. I apprehend this argument rests wholly upon a mistake of the plain grammatical construction of the words. The report in Lord Coke sets forth the special verdict, and gives the statement of the consistorial proceedings: "in which libel *decretum fuit quod Agnes subiret matrimonium, et insuper decretum fuit dictum matrimonium;*" that is, the second marriage "*fore nullum;*" that is, "in which libel it was decreed that Agnes should solemnise marriage; and moreover it was decreed that the said (that is the second) marriage

(1) P. 318.

(2) Lee's Ecc. Cas. by Phill. 57.

(3) 4 Co. Rep. 29; Moor, 169.

should be null." This is only a tense used in consequence of the structure of the sentence, which has reference, for the reasons I have assigned, to the sentence declaring the second marriage void, and not any reference to the solemnisation. Had the invalidity been referred to the date of the solemnisation, it would have been stated that "thereupon," or "thenceforth," or "thereafter," the second marriage should be held void; instead of this, the only word used is "*insuper*," moreover. Indeed how could any such sentence, as is supposed, have been pronounced by rational men? The argument for the defendant in error assumes it to have been declared that the second marriage was only to be held void \*after something subsequent, something posterior to its date, was done: in other words, A. imperfectly marries B., and then regularly marries C. *in facie ecclesie*; but the regular marriage is to be set aside by something which A. is to do after its celebration. It is to be set aside by matter *post*; and not only so, but it is to be declared, by reason of such matter *post*, to have been void *ab initio*. Was there ever yet an instance of a declaratory sentence proceeding upon any circumstances or facts whatsoever, other than those which existed at the date of the fact itself, whose validity or invalidity the sentence declares?

REG.  
v.  
MILLIS.

[ \*712 ]

It is, however, said, that in this case the special verdict found only an executory contract, namely a contract expecting and contemplating a future solemnisation; in which case there was really no marriage at all *per verba de presenti*, and Agnes might be held to be compellable to solemnise according to the contract. Again, if the second marriage was to stand until the first should be solemnised, the party solemnising the first was guilty of bigamy; and the decree of the Court, in effect, ordered him to commit bigamy. This is the inevitable consequence of holding that the first is not perfected before solemnisation, and that the second is not void, but only voidable, if its period of invalidity refers to the solemnisation of the first contract. Yet the use of this argument, so full of absurdity, may not be quite optional to the defendant in error; he seems bound, by the whole nature of his contention, to employ it. If the first marriage is only executory, the second cannot be avoided until the first is completed.

The three older cases relied on by the learned Judges are, the one in Edward the First's time, mentioned by Lord Hale in his manuscript notes, and \*copied thence by Mr. Hargrave in his

[ \*713 ]

REG.  
C.  
MILLIS.

note (1); *Foxcroft's* case (2), and *Del Heith's* case (3). The first of these authorities is involved in considerable obscurity, especially as to the Court which reversed the judgment of the Common Pleas. That Court had held A. to be seised before his feoffment to D., and during his marriage *per verba de presenti* with B., and had adjudged dower to the widow upon that seisin: thus holding the marriage good, upon the very solid ground that the sentence of a competent Court had decreed its validity. The reversal is said to be "*coram Rege et Concilio*;" and the learned Judges state, from Lord Hale's book on the Lords' House, that this was a Court attended by the Chancellor, Treasurer, and Judges. Lord Hale describes it (4) as the King's "*concilium ordinarium*;" and he says, none were members but those called thereto by the King. He then adds, that in ancient times all Privy Councillors were called to it, with the great officers of State, whom he enumerates as Chancellor, Treasurer, Steward, Admiral, Privy Seal, Chamberlain of the Household, Master of the Wardrobe, Comptroller of the Household, Chancellor of the Exchequer, and the Judges and Masters in Chancery. He adds, that in legal matters the Chancellor and Judges used to be called. It is evident, therefore, that we have no distinct conception of the constitution of this body as a regular Court; and, what is of great importance to the present argument, I am not aware that any one of its decrees has ever before, on any occasion, been cited in any Court, either of law or equity.

[ \*714 ]

But, again, let it be mentioned that the ground of \*the decision is here said to be A.'s having had no seisin "during his espousals with B.;" yet the phrase "espousals" is, strictly speaking, the term used for the *contractus sponsalibus*; a mere contract to marry. Lord Coke defines *sponsalia*, by *futurarum nuptiarum conventio et repromissio* (5); and such strict meaning may very possibly be the one given in this very ancient case. Was A.'s seisin then disputed, and held disproved, even before he enfeoffed D.?

It is further to be observed, which may possibly explain this case, that originally dower was held to be dependent upon a public assignment of it; and, beside the common-law dower, there was one called either *ad ostium ecclesiæ* or *ex assensu patris*, which, however, implied the public assignment, and was only for the

(1) Co. Litt. 33 a (n. 203).

MSS. 2117.

(2) Rog. Ecc. Law, 584; 1 Roll.

(4) Jurisd. Ho. Lo. 5.

Abr. 357; see 9 R. R. 411, n.

(5) Co. Litt. 34 a.

(3) Rogers' Ecc. Law, 584; Harl.

purpose of enabling a party to assign before the descent of the land was cast upon him. Therefore, Lord Coke says, in the same place, dower *ad ostium castri sive messuagii* is not good, it ought to be *ad ostium ecclesiæ sive monasterii*, for the law requires publicity and solemnity; and this agrees with Bracton (lib. 2, c. 39). Now we are told that this was anciently true of all dower, as well as of the two kinds *ad ostium* and *ex assensu*, and that in Henry the Third's time, a wife married *in camerâ* had it not (1). And, among other reasons for this, we may well suppose one to have been that the feudal lord was entitled to a fine whensoever the vassal's wife was entitled to dower. For this, a sufficient security was afterwards supposed to be afforded in the public assignment during the widow's quarantine, or the forty days elapsing after the husband's decease. But, more anciently, the further security was taken of requiring \*a publicity to the marriage which gave her a title to dower. This, therefore, would so far explain the reversal *coram Rege et Concilio*; and would only displace or supersede the reason given in the note, by another and a better one.

REG.  
v.  
MILLIS.

[ \*715 ]

But if reliance be placed upon Lord Hale's authority, supposed to be given in his note to the MS. account of this case, surely much more weight must be ascribed to what he did and said judicially; and this appears to be somewhat at variance with the doctrine alleged to have received his countenance in the MS. note. We find Roger North, in the life of his brother the Lord Keeper, complaining of Lord Hale for his partiality to sectaries; and the ground of this charge is, that he allowed a special verdict to find a Quaker's marriage: which, says the biographer, could not be good without the Liturgy, and therefore this was an infraction of the Act of Uniformity. Lord Hale said, he was unwilling to hold the children bastards, and he thought that all marriages made according to the principles of men severally should be held good, and receive their effects in law. I cannot agree with the learned Judges that his allowing a special verdict, which referred the question to the Court, is a proof of his holding the opposite opinion; for you must take the proceeding of allowing the special verdict in connexion with the *dictum* which accompanied it, and that was in favour of a marriage. There is, further, another note of Lord Hale, given by Mr. Hargrave in Coke Littleton (2), in which he holds a gift to a wife married "*post affidavitem et carnalem copulam* void," and, consequently, holds the marriage good.

(1) Perk. s. 306.

(2) 34 a, n. 209.



REG.  
v.  
MILLIS.  
[ 716 ]

One thing, however, is admitted to have been held by this case cited from the MS. note, *tempore* Edw. I. The marriage *in facie ecclesie* and by force of the Ecclesiastical Court's sentence, had no relation back; for it was not held to make the first marriage good *ab initio*, else it would have made A.'s seisin good before the feoffment to D., and standing that which had now become a perfect marriage with B. Yet the whole of the argument on the other side, upon *Bunting v. Lepingwell*, rests upon the effect of the subsequent solemnisation of an imperfect contract, working by relation backwards the completion of that contract, and making it *ab initio* valid.

Another thing is also to be observed in this note, equally at variance with the argument of the learned Judges. B. recovered A. for her husband according to the note, and how? By sentence of the Ecclesiastical Court, and that sentence never was reversed. Here then was an end of the question of validity, for by that sentence *transit in rem judicatam* having (1) been decreed by the proper authority.

Therefore this case, *tempore* Edw. I., so much relied on by the learned Judges, is, when well considered, just as much in conflict with the argument of the defendant in error as with that of the plaintiff.

Of *Foxcroft's* and *Del Heith's* cases it may justly be said, that by proving too much, they prove nothing. According to the former, a marriage celebrated by the Bishop of the diocese is void, merely because not celebrated in a church; and according to the latter case, a marriage celebrated by the parish priest is void for the same reason. Nor will it avail to say that such has long ceased to be the law. When did it cease? By what authority did it cease? When it \*did cease, have we any ground for holding that the presence of any priest at all was retained as an essential part of the solemnity?

The same may be said of another and a still more ancient authority, relied on by the learned Judges; the L. L. Edmundi, published by the Record Commissioners. To make nuptials "binding to all prosperity," it is said there must be present a Mass-priest (1). Now this excludes a deacon; yet who doubts the validity of deacon's orders for this purpose? I mean even according to the contention that requires sacerdotal presence and aid.

But the case mainly relied on, of *Haydon v. Gould* (2), receives

(1) [Schmid, Ges. der A.-S., App. VI., "Be wifmannes beweddunge," as the date ascribed to it.—F. P.]  
a. 8. The document is not authoritative, though certainly at least as old as the date ascribed to it.—F. P.]

(2) 1 Salk. 119.

REG.  
F.  
MILLIS.

illustration from the same argument. That was a marriage of two persons of the Sabbatarian sect according to their own forms, and no priest or deacon being present. The wife died, and the husband claimed administration, which was refused. The Delegates, on appeal, affirmed the sentence. The ground, however, of the decision is distinctly stated to be, that when the husband claims a right under the ecclesiastical law, he must prove himself to be a husband according to that law; that is, in the manner which the ecclesiastical law approves. It is added that the wife, who is the weaker sex, and the child of such marriage which was in no fault, might have had administration, but not the husband who was in fault; he is treated as a wrongdoer, and as a matter of discipline the Court Christian will not countenance his conduct in contracting an irregular marriage, by suffering him to take a benefit under it conferred at their hands. This is the view of the case taken by a very high authority, Lord Chief Baron Comyns (1). Nor should it be forgotten that one part of the case clearly \*proves too much, for it holds the plea in the Ecclesiastical Courts to be of a marriage "*per presbyterum sacris ordinibus constitutum*," which would exclude a deacon; and yet it is on all hands agreed, as I have before said, that whatever a priest can do in this respect, a deacon may do as validly.

[ \*718 ]

I have mentioned the view taken by Chief Baron Comyns, in his Digest, as being in accordance with my argument; but he also sat in judgment himself upon a case in which this question arose, and he then concurred in a judgment to the same effect. *Fitzmaurice v. Fitzmaurice*, in 1782, came before the Delegates, of whom the Chief Baron was one. It was the case of a marriage *per verba de presenti*; the Court held it valid, and the LORD CHANCELLOR refused a commission of review. Sir W. SCOTT cites it with great respect in *Dalrymple v. Dalrymple* (2), from a note furnished him by Dr. Swabey. Lastly, we must bear in mind, that before the Statute of Distributions, the Ecclesiastical Courts gave or refused administration at pleasure; and this case of *Haydon v. Gould* occurred not very many years after that statute came in force, and before the new and strict rules as to granting administration were in use.

We now approach authorities not exposed to any such objections. But before I come to these I wish to state what appears to me the result of the whole, both as affirmed by text writers, and as laid

(1) Com. Dig. tit. Baron & Feme, (2) 1 Hagg. Cons. Rep. 69.  
B. 1.

REG.  
 \*  
 MILLIS.

down by the decisions of the Courts. With this statement I should have begun, had not my unfeigned respect for the learned Judges made me anxious, in the first instance, to deal with the cases upon which they have relied, and thus clear the ground for my argument.

[ 719 ]

The Roman or civil law is the foundation of the personal law of Europe, and the inroads of the feudal law upon that symmetrical and finished system have been chiefly confined to the rights connected with the enjoyment and transfer of real property, between which and personal estate the more ancient law made no distinction. The canon law regulating the Ecclesiastical Courts, which early assumed to dispose of questions relating to marriage, to the proof of wills of personal estate, and to the appointment of administrators in cases of intestacy, is most especially drawn from the fountains of the civil law. This law is its foundation; the additions or superstructure were made by the decretals of the Popes and the Councils, which had succeeded both to the Emperors and to the Apostles, perhaps more clearly to the Emperors than to the Apostles, and which especially governed the body of the Church. Now, by the civil law, and by the earlier ecclesiastical law,—indeed by that law until the 16th century,—marriage was a mere consensual contract, only differing from other contracts of this class in being indissoluble even by the consent of the contracting parties. It was always deemed to be a contract executed without any part performance; so that the maxim was undisputed, and it was peremptory, "*Consensus, non concubitus, facit nuptias vel matrimonium.*"

[ \*720 ]

Now, it is clear that, by the universal law of Europe before the Council of Trent, this contract could be validly solemnised by the parties consenting to take each other for man and wife, without the interposition of the sacerdotal office, or the presence of any one in holy orders. The Church was always anxious to interfere, to require the benediction of a priest and even the performance of mass, and to discountenance, \*as far as possible, any marriage not so solemnised; but in a matter so interesting to mankind, and in which their strongest feelings were embarked, the clergy in vain attempted to obtain the ascendant they sought; and it was only by the decree of the Council of Trent that the sacerdotal institution became essential to the validity of the nuptial contract. This clearly appears from the Decretals, book 4, where it is laid down, that a man and woman legally competent to contract matrimony shall take each other for husband and wife *per verba de præsenti*

*tempore*, without more; that they are thereby bound as such, and that if either party contract a second marriage, living the other, it is void, and the parties to the first contract may be compelled to cohabit. In consequence of what has been said respecting the Council of Winchester in 1076, I shall now read the words of Pope Gregory IX.'s decree, 150 years after that Council: "Si inter virum et mulierem legitimus consensus interveniat de præsenti, ita quod unus alterum consensu verbis consuetis expresso recipiat, utroque dicente, Ego te in meam accipio, et Ego te in meum, vel alia verba consensum exprimentia de præsenti, sive sit juramentum interpositum, sive non, non liceat alteri ad alia vota transire; quod si fecerit secundum matrimonium de facto contractum, etiamsi sit carnalis copula subsecuta, separari debet, et primum in suâ firmitate manere" (1). This is what I have already stated as the limit of the Ecclesiastical Court's power in regard to compelling performance: it assumes the marriage to be perfect, and decrees performance of its obligations. The oldest and most venerable authorities agree in giving this account of the matter in \*express terms: Sanctius "De matrimoniis" affirms the validity of a marriage without a priest, before the Council of Trent. De Burgh, in his book written at the end of the 14th century, and called *Pupilla Oculi*, expressly says, treating "De sacramento matrimonii;" "*Patet quod ad collationem hujusce sacramenti non requiritur ministerium sacerdotis*;" and he afterwards goes on to say, that neither the sacerdotal benediction nor any other prayers pronounced by the priest are "*forma sacramenti, nec de ejus essentia, sed quoddam sacramentale ad ornatum pertinens sacramenti*." He had before said that the parties could mutually administer this sacrament to each other, or either to him or her self; and that no minister was required for its administration other than the parties themselves; "*non requiritur alius minister distinctus ab ipsis contrahentibus*." Words cannot be more distinct than these.

The Council of Trent required, and for the first time required, the marriage to be in the presence of a priest. But of what priest? Of the parish priest. The Council of Trent never was received or acknowledged in England; of which we may at once see the proof in this, that there we have no pretence ever set up, nor any contention, that the parish priest's presence is necessary. But if the Council of Trent never was recognised in England, have we not a right to fall back upon the common and universal law of Europe,

(1) Decretal, lib. 10, pl. 1, c. 31.

REG.  
v.  
MILLIS.

[ \*721 ]

REG.  
&  
MILLIS.

as our own in this important matter? Now, that decree is itself the most irrefragable proof of this; for it begins by declaring all past marriages valid without any sacerdotal interposition; and consequently pronounces that the requiring a priest's presence is prospective merely, and an alteration of the former law.

[ 722 ]

I next have to observe, that nothing can be more improbable than the existence of one law for all Christian Europe, and another for England on this important head. All Europe, including England, lived under the same religion, under the same ecclesiastical system, under the same spiritual rule. The presumption is, that the English law touching marriage is the same with the general law of Catholic Europe; and this presumption can only be rebutted by distinct proof that England has receded from that law, and made her own an exception to its tenor. I am entitled to lay this down upon general principles, but I have also the venerable authority of Sir W. SCOTT, who, in the case of *Dalrymple v. Dalrymple*, distinctly states, that the general law of Christian Europe touching the marriage contract must be taken to be the law of Scotland, unless it be shown "that the Scotch law has actually resiled from it" (1). "Show the variation," says the very learned Judge, "and the Court must follow it; but if none is shown, then must the Court lean upon the doctrine of the ancient general law" (2).

[ \*723 ]

If any difference were to be made between the general continental and our insular law, it would be that sacerdotal intervention would be less requisite here than abroad, especially after the Reformation; for on the Continent, that is, in all Catholic countries, marriage is deemed to be a sacrament: with us it is not. Sacraments do not, indeed, necessarily require a priest, as baptism has been solemnly decided, in a late case before the Privy Council, to be valid without one; but where a rite is sacramental, it may, *in dubio*, be more easily presumed to require the priest's \*ministry than where the rite is not a sacrament at all. The probability, then, being that our law is the same with the foreign, it requires clear proof to show that England had a marriage law peculiar to herself. Have we any such proof?

The first thing that strikes us on this cardinal point of the cause is, that one of the authorities cited, John De Burgh, as laying down most distinctly that consent of parties is enough without a priest, and that a priest's intervention is only as to the clothing or ornament of the proceeding, and not essential, is an English divine.

(1) 1 Hagg. Cons. Rep. 103.

(2) *Id.* 81.

He was high, too, in our Church, and he was Vice-Chancellor of the University of Cambridge.

REG.  
v.  
MILLIS.

But a better known and more venerable text writer, Bracton (1), gives, though more generally, a similar account of the contract, and he distinctly lays it down, that after a marriage *per verba de presenti* any feoffment or gift by the baron to the *feme* is void; therefore he clearly holds such a marriage to be valid and perfect. So, in treating of the legitimacy of issue, he pronounces the issue legitimate "*quem juste nuptie demonstrant*," and he then enumerates the several kinds of *juste nuptie*; saying that the marriage is complete, that is, the *nuptie* are *justæ*, whether public or clandestine, and whether *per verba de presenti* or *de futuro*, so it be indissoluble; the marriage *per verba de futuro* requiring of course consummation or part performance, to perfect such an executory contract. What he says of dower has regard apparently to the assignment of it *ad ostium ecclesiæ*. Wherever the legitimacy of issue is mentioned, the marriage *per verba de presenti*, or *per verba de futuro cum copula*, \*is given as sufficient, and no mention is ever made of the *benedictio sacerdotalis* as essential. However, the first case which I shall cite solves this question of dower, and shows that, whatever may have been holden in more ancient times, dower at common law was in all the more recent decisions held to accrue on marriage, though not *in facie ecclesiæ*.

[ \*724 ]

I observe that the learned Judges cite the authority of Archbishop Lanfranc's Council, holden at Winchester, in William the Conqueror's time, A.D. 1076, and given in Wilkin's Concilia. It is said to hold a marriage illegitimate which was unaccompanied with the benediction of a priest; but I have cited the higher authority of the Decretals, book 4. Would Archbishop Lanfranc himself have denied that Pope Gregory IX. had authority to overrule him? Yet his Decretal, which I have already cited, was promulgated 150 years after Lanfranc's Council. The whole canon law was not certainly received in England, but in Catholic times our Ecclesiastical Courts assuredly were bound by the Decretals; and the case *temp. Edw. I.*, cited from Hale, shows this plainly, for there the Spiritual Court decreed the marriage without a priest to be good.

In looking to the authority of decided cases, I need not go back farther than *Wickham v. Enfield* (2). There, on a writ of assignment of dower at common law, a plea was pleaded of *ne unques*

(1) 4, 8, 303; 9, 304; 5, 420.

(2) Cro. Car. 351.

REG.  
v.  
MILLIS.

[ \*725 ]

*accouple*, precisely as in the well-known case nearer our own times of *Ilderton v. Ilderton* (1). In the latter there could be no sending to the Bishop, because the demandant had replied a marriage in Scotland; in *Wickham v. Enfield* the replication merely took issue on *ne unques* \**accouple*, and a writ went to the Bishop, who certified that the parties were coupled in *vero matrimonio sed clandestino*, and had cohabited till the death of the husband. Judgment having been given for the demandant and error brought, one error assigned was that the answer of the Bishop was not in the affirmative to the writ, namely, that the parties had been coupled in legal matrimony; but the Court held *verum matrimonium sed clandestinum* as good as *legitimum matrimonium*, and the judgment of the Common Pleas was affirmed.

[ \*726 ]

The case of *Collins v. Jessot* (2) is of great importance, because it gives Lord Holt's clear and unhesitating opinion, in which the whole Court concurred, that a contract *per verba de presenti* amounts to an actual marriage, and as much a marriage in the sight of God as if it had been *in facie ecclesie*; with this difference, that cohabitation before the religious solemnity is punishable by ecclesiastical censures. I do not at all understand the doubt cast upon this case by the learned Judges: they say, "If by the terms *ipsum matrimonium*, Lord Holt intended to lay down the position that it was so held by the common law of the land." Now his words are, "actual marriage, and as much so as if *in facie ecclesie*." But, say the Judges, he may have meant only a marriage by the canon law: to which I make two answers: first, that the canon law in his time, if by that he meant the law of the Catholic Church, had, by the Council of Trent, required the presence of the parish priest; but if it be said that was not received here, then I answer, secondly, that Lord Holt expressly excludes the supposition of the learned Judges as to his meaning, \*by the distinction which he explicitly takes, namely, admitting that a cohabiting before solemnisation *in facie ecclesie* exposed the parties to Church censure; so that, instead of asserting the validity by the canon law, he would rather seem to admit that the validity was questionable by that law.

I cannot avoid here observing, that there is no statement by the learned Judges that this important opinion of Lord Holt was also the opinion of the whole Court, until they come to speak of Sir W. Scott's mention of it: yet it was the opinion of the whole

(1) 2 H. Bl. 145.

(2) 6 Mod. 155; 2 Salk. 437, nom.  
*Jesson v. Collins*.

Court, Mr. Justice POWELL differing only on another point, namely, that a contract *per verba de futuro* prevents the parties contracting another and a subsequent marriage. On the main body of the LORD CHIEF JUSTICE's opinion, Mr. Justice POWELL, as well as the others, Mr. Justice POWYS and Mr. Justice GOULD, agreed with his Lordship. It is, therefore, an opinion of the greatest weight; and as for the observation of the learned Judges, that the case before the Court might have been decided without raising that question, I would respectfully pray your Lordships and the learned Judges to reflect how far such an argument will go in impeachment of decided cases, when we consider how vast a bulk of the law now received as decided by the Courts of Westminster Hall rests upon the resolutions of the Judges on points not strictly necessary to the decision of the questions before them.

REG.  
F.  
MILLIS.

The argument raised by the learned Judges in *Wigmore's* case (1), to show that in *Collins v. Jessot* Lord HOLT had spoken only with reference to the canon law, does not appear to me at all maintainable; \*for though he there speaks of the canon law, yet he adds the words (cited from his own Reports), that the "law of man ordains marriages to be made by a priest, yet only makes them irregular, and not void, if made without one;" although he certainly holds that dower depends on the religious solemnity, probably referring to what the books say of dower *ad ostium*. But the learned Judges seem wholly to admit in their consideration the force and effect of *Wigmore's* case, upon the argument at the Bar. That case was of a prohibition: the Spiritual Court was proceeding to punish a party for fornication, on account of a cohabitation after a marriage by an Anabaptist minister, a layman; and the Court did prohibit, manifestly on the ground of the marriage not requiring a priest of the Church. In the former case of *Collins v. Jessot* the Court of King's Bench had held that by Church censures the parties might be punished, because it was a breach of order, ecclesiastical order, like the mere fact of celebrating a clandestine marriage, which we know in Scotland exposes the parties to Church censures, though the contract is valid to all civil purposes.

[ \*727 ]

I may here take notice of that class of cases in which marriage celebrated by a Roman Catholic priest has been held clearly valid by our Courts: *Regina v. Fielding* (2); *Rex v. Brampton* (3); *Lautour v. Teesdale* (4). Now, if marriage requires a person in orders to

(1) 2 Salk. 438.

(3) 10 R. R. 299 (10 East, 282).

(2) 14 St. Tr. 1327.

(4) 17 R. R. 518 (8 Taunt. 830).



REG.  
v.  
MILLIS.

[ \*728 ]

constitute its validity, I would respectfully venture to ask how he is the more in orders with us for his being a Roman Catholic priest? It is true that our Church recognises the Roman Catholic ordination in the case of persons who have renounced the errors of Popery \*and become members of our national Church; and this on account of the Apostolic succession. But does it recognise such orders in Roman Catholics continuing such? Would not such a priest be punishable were he to administer the sacrament in any of our churches, as much if he did it according to our own ceremonial as if he said High Mass according to his own? Is he in any one particular recognised as a person in orders while he remains a Roman Catholic? Though on this subject I would be understood to speak with the hesitation which is becoming on such a subject, yet I must add that I have in vain endeavoured to find any one instance in which the recognition of the orders does not depend on the party's recanting. I see also the consequence of holding that Roman Catholic orders are valid to any civil or ecclesiastical purpose while the party ordained continues a Roman Catholic; and surely no one will contend that if an act is done by a Roman Catholic priest before his recantation of Popish errors, his subsequent recantation can operate by relation backwards to give the intermediate act validity. I cannot therefore suppose it possible that, in those cases to which reference has been made, the contract *per verba de presenti* was held to be *ipsum matrimonium* on the ground of a Roman Catholic priest being present; they must be taken as decisions that the contract without any person in holy orders is an actual marriage. One of them indeed, *Rex v. Brampton*, expresses Lord ELLENBOROUGH's opinion very clearly, that before the Marriage Act of 1753 such a contract was valid. That Lord KENYON held the same opinion is plain enough from what he said in *Reed v. Passer* (1); although he says he speaks not so \*as to be bound by the *dictum*. But this is no more than the caution which any discreet Judge would use in dealing with a proposition of such importance at *Nisi Prius*. In *Lautour v. Teesdale*, Chief Justice GIBBS held the same doctrine explicitly, and without any qualification, the case being in Banc.

[ \*729 ]

But these decisions, say the learned Judges, are rested expressly on the authority of Sir W. SCOTT; and Sir W. SCOTT, they add, cites the *dictum* of Lord HOLT. Surely it is so: but does that detract from the weight of either Lord HOLT's *dictum*, that is, the

*dictum* of the whole four Judges of the King's Bench, or Sir W. Scott's decision and argument? Very far from it; it only furnishes an additional reason for being extremely cautious how we set aside those older authorities, and break in upon the principles which they establish, which subsequent decisions have adopted, which succeeding Judges have followed, and which until the present time have never been impeached.

REG.  
v.  
MILLIS.

I now come, therefore, to the only two of these great cases not yet discussed, and they are all the more important that they are decisions in the *forum* proper to such questions, namely, the Courts Christian. *Lindo v. Belisario*, in 1795 (1), came first before Sir W. Scott, then by appeal before Sir William Wynne, and it raised the point directly of the validity of a Jewish marriage. The marriage was held invalid, a minute examination of the contract proving, by reference to the Jewish authorities and the rabbis, that the ceremony performed did not amount to a matrimonial contract, but only to a betrothment. The ceremony consisted of the taking of a ring by the woman, after saying that she admitted her knowledge \*that by the taking it she became the man's wife: all that the man did was to ask her that question, and put on her finger the ring, repeating Hebrew words, which mean not any consent of his, but only an address to the woman that she shall be holy to him according to the law of Moses. But it was proved that a formal contract in writing, signed by the man, was required to be delivered by him to the woman, according to the Jewish customs, before the marriage took place: thus, there wanted *verba de præsenti* certainly on the man's part, possibly on both his and the woman's part; but there also was this radical defect, that if these words had been used, and only meant a betrothment, expecting a further ceremony to make them a marriage, the words, though used, would have had no real meaning as *verba de præsenti*, and the whole proceeding would have been executory merely, according to the distinction which I set out with taking. The importance of the case, however, is this: not an attempt was made even at the Bar to impugn this alleged marriage on the ground of a priest not having been present, and the Court, after full argument and in much doubt, directed questions to be put to learned men: all which argument would have been unnecessary, all which doubt would have been removed, all which questions would have been wholly superfluous, had the doctrine of the learned Judges in the present case, and the contention

[ \*730 ]

(1) 1 Hagg. Cons. Rep. 216,

REG.  
v.  
MILLIS.

[ \*731 ]

of the defendant in error, been well grounded; for the want of a person in orders was undeniable, unless, indeed those who hold an unconverted Roman Catholic to be in Protestant orders, also proceed to take another step in the same direction, and hold that a Jewish rabbi is a Christian priest. The argument of Sir W. Scott distinctly lays it down, that in the Christian \*Church a contract *per verba de presenti* is a perfect contract of marriage, though the canon law required subsequent celebration (1); and referring to the Scotch marriage law, he says (2) that the rule prevailed both in Scotland and in this country until other civil regulations in England interfered with it, plainly referring to Lord Hardwicke's Marriage Act.

[ \*732 ]

The doctrine thus laid down by that great Judge in 1795, and not departed from by the Court of Arches, I may say, the doctrine assumed to be irrefragable by both the parties and the Judges throughout the whole of this case, was never disputed during the period which has elapsed from that day to the present, a period of nearly half a century; but it received a remarkable confirmation in the more celebrated case of *Dalrymple v. Dalrymple*, to which I must now beseech the best attention of your Lordships. The question there was, whether a marriage was valid alleged to have been had in Scotland; and the whole turned upon what was the Scotch law; the *lex loci*, which it was admitted must entirely govern the consideration of the case. The argument both in the Court below and before the Delegates, where I was of counsel with the respondent, was most full and elaborate, bearing a just proportion to the importance of the case, which involved the status of the heir presumptive to high honours and ample estates, and involved also the consideration of great principles of law. The judgment in the Delegates was a simple affirmance, according to the custom of a Court which was never wont to give reasons for its decrees; but I will venture to assert that no one of the many advocates \*who argued it ever thought of disputing the doctrine laid down by the Court below, in point of law; all confining themselves to canvassing the decision upon the fact of what the Scotch law was proved to have been by the evidence in the cause. In this assertion I am borne out by the learned Judge of the Court of Admiralty, with whom I have consulted fully on the whole subject; he was also of counsel in the cause. This memorable judgment, therefore, remains undisputed to this hour; and it is only bestowing

(1) 1 Hagg. Cons. Rep. 242.

(2) *Id.* p. 232.

upon its merits at once the most just and the highest praise to say that it excels all the other performances of its eminent author, whether we regard the clearness of its positions, the close texture of its reasonings, the singular felicity of its diction, or the careful avoiding of all superfluous argument; all extrajudicial discussion. But in weighing its authority, let us rather remark that it was most minutely considered and elaborately prepared; and I will add, from the direct authority of the learned counsel who reported the case, that every line was submitted to Sir W. SCOTT, and every line received his correction and approval. In the whole compass of our books there is not to be found a decision more deliberately pronounced, or a judicial argument more carefully stated. In their whole compass is no report to be found more authentic in its statements of what fell from the Court.

Sir WILLIAM SCOTT lays it clearly down, that until the Marriage Act, which, according to Mr. Justice BLACKSTONE, was “an innovation on our laws and constitution,” the English law, agreeing with that of all Europe, held a marriage *per verba de presenti* valid without the intervention of a priest; and he cites the cases of *Collins v. Jessot*, *Bunting v. Lepingwell*, and \**Wigmore*, in proof that his doctrine is that of the Common Law Courts, as he distinctly and authoritatively states it to be the doctrine of the Courts Christian. To suppose that he was ignorant of the case of *Haydon v. Gould* would be absurd, considering that it was decided in the Delegates, that he quotes from the book in which *Haydon v. Gould* is reported, and that this case regarded a matter strictly of ecclesiastical cognisance; the granting of administration. But he does state the case of *Fitzmaurice v. Fitzmaurice*, which was also before the Delegates, and to which I have already referred. His observation respecting the Ecclesiastical Courts is, however, very material; for, as if it was more clear there than at common law, he adds, after citing *Wigmore's* case, “in the Ecclesiastical Court the stream ran uninterruptedly in that course.” He also in terms negatives the position that marriage, because it was a sacrament in the Romish Church, therefore required to be celebrated by a clerk; and declares that until the Council of Trent altered the law of the Church, this sacrament could validly be celebrated by laymen all over Europe, as even after that Council it continued lawfully to be celebrated in England, notwithstanding the decree of the Council, which in England never was recognised; and I may state that in the Judicial Committee it has been held, after the fullest consideration,

REG.  
v.  
MILLIS.

[ \*733 ]

REG.  
MILLIS.

[ \*734 ]

[ \*735 ]

that any lay person, without a priest present, may administer baptism, which is a sacrament of our Church, using the form of words, "I baptise thee, in the name of the Father, Son, and Holy Ghost." Now, it is said in the argument at the Bar, and I am somewhat surprised to see the observation countenanced by the learned Judges, that these *dicta*, as they are termed, of this great Judge, are extrajudicial. Were they mere *dicta*, and \*were they wholly extrajudicial, I have yet to learn that, proceeding from such a quarter, they are not entitled to unbounded respect. No Judge was ever less prone to travel out of the case before him; I speak from experience of that learned Judge, not only having argued many cases before the Delegates arising out of his decisions, but also having practised for a long course of years before himself and Sir WILLIAM GRANT at the Privy Council: none ever abstained more scrupulously from ventilating opinions uncalled for, none ever was more cautious in delivering his sentiments on important points. To suppose that he would have needlessly gone out of his way rashly to declare all marriages before the Marriage Act valid without any clerical solemnity, rashly to declare that all marriages now since the Act are valid in the colonies without any such solemnity, rashly to declare that all Quaker marriages and all Jewish marriages are at this day valid; that this cautious Judge, so wedded to the doctrines of the Church, so jealous of any infringement of her prerogatives, so averse to any interference with her authority, should have needlessly volunteered such opinions as these in derogation of her prerogatives, or have stated them unless upon mature deliberation he had held them absolutely clear and free from all doubt, is one of the most extravagant suppositions which man can make, and proceeds from a profound and gross ignorance of Sir W. SCOTT's judicial character and whole habits. That he should on such ground ventilate needless and extraneous *dicta*, seems hardly credible; but if what he said on such matters be extrajudicial, it is only a stronger demonstration that he held the opinions thus volunteered to be perfectly free from all possibility of doubt, and was intimately convinced that in thus \*needlessly stating them he moved no landmarks, brought nothing that was fixed into any doubt, laid down nothing that could impugn any fully established doctrine.

But, with very great submission, I do most distinctly deny that the doctrine of Sir W. SCOTT was a mere *dictum* and extrajudicial. The point he was proving, the point on which the whole case

hinged, was the Scotch law of marriage. He undertakes to show that this is in favour of marriage *per verba de præsenti*, and he accomplishes his purpose by showing that the general law of Europe, including England, is in its favour; and that, therefore, it must be taken to be the law of Scotland, unless and until Scotland be shown to have excepted herself from that law by special provisions of her own. The question being, is it the Scotch law? he argues that it is the Scotch law, because it is the European law. Had England been an exception, that argument would have failed, because it would then have been said, the law in question is not the general law; for instance, it is not the English law. He shows that England is no exception, and that therefore it is the general law, and therefore it is the law of Scotland; and therefore the marriage in judgment before him is good. Nothing can be conceived more close than this reasoning, nothing more solid than the connexion between the conclusion and its premises. That conclusion is the decision of the question before him; these premises are the English marriage law.

Thus far the decisions and authorities of the English Ecclesiastical Courts; and it must be observed, that they furnish a complete answer to the argument which I know has weighed with some in considering the case; namely, that any question of marriage before \*Lord Hardwicke's Act, *per verba de præsenti*, without a priest, arising in a court of law, would have been referred to the Ecclesiastical Courts, and that those would have certified against its validity. Most clearly they would not so have certified, if they decided according to the ecclesiastical law, as Sir W. Scott and his brethren the civilians understood it. I have shown that Sir W. Scott and his brethren considered the point as more clear by their law than it is by ours, because Sir W. Scott said that their law on this question had always flowed in a clear and unbroken stream. Therefore they must have certified in favour of the marriage, and to assume the contrary is a *petitio principii*.

But it is not merely on decisions and *dicta* in those Courts Christian that the question turns. Consider the case of Jewish and Quaker marriages. It is quite manifest that the validity of these is quite irreconcilable with the opinion of the learned Judges in the present case; yet not only are they apparently assumed to be valid by the provisions of the Act (26 Geo. II. c. 33, s. 18), but we have the authority of the cases decided on the point; as

REG.  
F.  
MILLIS.

[ \*736 ]

REG.  
MILLIS.

the one cited by Mr. Justice WILLES, in *Harford v. Morris* (1), of an action of criminal conversation by a Quaker, and the objection taken and the point argued that the marriage was not good for want of a clergyman; but this was overruled, and the plaintiff recovered a verdict.

[ \*737 ]

There is, however, a much more material fact on this head: the number of persons belonging to the Society of Friends and to the Jewish persuasion who have obtained administration from the Ecclesiastical \*Court, and obtained it without a struggle. I might, indeed, add the number of cases in which titles must have been made and deduced through the issue of Quaker and Jewish marriages; nay, the number of cases of persons who, born of such marriages, have been allowed quietly to take estates, real and personal, without any relative claiming or thinking of claiming to their exclusion; and also the numberless instances in which the Crown would have been entitled; no claim having, however, been made in any one instance by any one *Attorney-General*. Were the doctrine of the learned Judges well founded, not a single Jew or Quaker could have departed this life without an inquisition of office, and a finding to entitle the Crown; but so entirely was the law concealed from all former times, that no instance has ever occurred of any such attempt being made.

[ \*738 ]

Finally, the law as laid down in 1811 by the Consistory Court of London, and confirmed in 1814 by the Delegates, has ever since been acknowledged as the governing rule on this most important question; that decision only repeating more explicitly what the same learned Judge had pronounced more succinctly, but as distinctly, in 1795. For near half a century, therefore, it has been held as established and settled law in England; and not only have the other Courts decided other cases upon its authority, never questioned by them; not only must the discovery of the present day be held to subvert those other decisions, and to hold that they were all wrongly pronounced; not only have all the learned civilians been so assuming the laws, and so advising their clients uniformly, until the present opinion respecting Sir W. SCOTT's decisions carried consternation into the vicinity of St. Paul's; but marriages innumerable have been contracted \*both by sectarians in this country, and by persons of all descriptions in our vast possessions beyond the seas, possessions on which the sun never sets, all of which are now found out to be void, all these parties fornicators and

(1) 1 Hagg. Cons. Rep. App. 7.

concubines, all their issue bastards. Into the sad details of such a subject I will not enter; from so painful a prospect I will avert my eyes. But this I must add before I leave it, that every Quaker and every Jew born of a marriage had before the year 1835, is by the learned Judges pronounced to be a bastard; the mother of each and every of these to be living in concubinage; every married pair of these sects may separate, and marry again without committing a felony; and every title to an estate, wheresoever situated out of Scotland, that is traced through a pedigree any link of which is a Quaker or a Jewish heir, must be shaken to its foundation, unless propped up by the Statute of Limitations and the lapse of long time.

The Marriage Act, in exempting those marriages and the marriages beyond seas from its operation, seems to assume their previous validity, and therein to assume the universal validity of lay marriages before it was passed; but this inference the Judges will not suffer to be drawn, and they declare all such marriages void by the effect of their doctrine. It is in vain for these learned persons to seek an escape from this conclusion, so far as it affects the Jews, by setting up the notion, destitute of all warrant from analogy, and repugnant to every principle of law, that the Jews are *quasi* foreigners, and that therefore they are a law unto themselves. The Jews are no more foreigners than we ourselves, or the learned Judges, are foreigners; and if they were, their laws and their usages could no more exempt them from the operation \*of our law than any admitted foreigner could be suffered in England to set up a marriage void by our law, as good by the foreign law of the country he belonged to. Not to mention, that even were we to admit their doctrine as to the Jews, the Quaker marriages would remain annulled; and that is quite enough for my argument.

Surely it required such a doctrine to be not only reasonably clear, but to be free from all possibility of doubt, to warrant the authoritative promulgation of it in this place by such venerable authority. Surely nothing can justify the giving vent to a proposition of law so frightful in its consequences, if it is encumbered by any difficulty, if it is confessed to be "involved in much obscurity," if those who have discovered it are obliged to allow that they have only been able faintly to descry it through a "still deeper obscurity" than veiled it "from the eyes of their predecessors," and to acknowledge that its form and proportions are so ill defined in the darkness which shrouds it, that they feel "unable to trace out and define its boundaries."

REG.  
t.  
MILLIS.

[ \*739 ]



REG.  
v.  
MILLIS.

[ \*740 ]

In other cases, where a grave doubt has long prevailed on any matter of law, even where an admitted error had crept into the decisions of Courts and the proceedings of practitioners, the safer course has been held, when that error was discovered, to abide by it, and not to revert to the sounder principle which it is admitted should never have been departed from. I remember, when I sat on that woolsack, a case occurred which was eminently calculated to illustrate this wholesome, judicious, and humane course of decision. For a long period of time the maxim had prevailed, that in point of law a real estate could be tied up by a strict settlement for the duration of the lives in being, and for \*21 years longer. The origin of the error, for it clearly was an error, was this, that in point of fact a fine never could be levied to bar the issue in tail, or a common recovery suffered to bar the remainders over, until the son of the last tenant for life was of age. Now, when the matter came to be questioned in the case of *Cadell v. Palmer* (1) before me here, in 1833, when I had the assistance of the learned Judges, we all were agreed that the doctrine of adding 21 years as a term in gross, to the duration of the existing lives, was a mere mistake, and the more clearly a mistake because we so plainly saw how it had arisen; yet we all agreed that after the Courts had so long acted upon it, and the conveyancers had so long proceeded upon the assumption, reverting to the true principle would be most pernicious, and would shake the titles to many estates all over the country. I make bold to think that a shock given to all the titles in England would not have been more fatal to the peace and happiness of society, than the shock which disturbs numberless families, affects the character of parents, and deals out to their progeny the portion and the name of bastard, besides shaking also an almost equal number of titles to real estates.

[ \*741 ]

Human legislation is exposed, is necessarily liable, to three great imperfections: the lawgiver cannot foresee and provide for all possible cases; his provisions may in their application become inoperative or frustrated by the destructive operations of time, the powerful and sleepless enemy of all human works; and his commands, how carefully soever framed, may be erroneously interpreted. There is no good or safe remedy for the first of these evils, but a resort to the \*legislative power for new provisions. For the second there is a remedy, and human wisdom has applied it. "Time" (as was most eloquently said by Lord PLUNKET) "is

the great destroyer of evidence, but the law has wisely and humanely made him the protector of title. If he comes with a scythe in one hand to mow down the muniments of our possession, he bears in the other an hour-glass, whence he metes out incessantly those portions of duration which are to render unnecessary the muniments that he has destroyed." Thus far the wisdom of the lawgiver.

REG.  
v.  
MILLIS.

A like remedy has been applied to the third evil by the wisdom of the Judge, who, after men have been suffered for a length of time to misconstrue the lawgiver's commands, will not permit advantage to be taken of their innocent mistake to work their ruin. What once was crude error becomes sound law by the humane wisdom of the Judge, as by the healing power of nature an ulcerous mass becomes a vital part of our bodily frame. If ever there was an instance in which a common error (supposing, which I deny, that it was an error) might be permitted, mercifully towards its victims, to make the law, it surely is that case in which the supposed misapprehension of the law, sanctioned by such illustrious names as HOLT, and COMYNS, and SCOTT, and KENYON, has involved the dearest interests, the security, the station, the fortunes, the fame of thousands; in which the victims of such a mistake are not even those who were beguiled into it by those venerable authorities, but their offspring, wholly guiltless even of the venial offence of falling into the error.

My Lords, I humbly move you to give judgment for the plaintiff in error; but if you shall not feel prepared at present to take this step, I then beseech \*you, I earnestly beseech you, not to give judgment for the defendant in error. I recommend you to delay your final award in this great cause, until you have an opportunity of receiving the useful and needful assistance of the learned Judges who preside in the Consistorial and other civil-law Courts of the realm. To those Courts, properly speaking, the cognisance of the question belongs which this writ of error raises, and upon which alone its decision turns. The argument of the learned Judges in the Courts of Common Law, alone now consulted, admits, nay asserts, the peculiar dominion of the Courts Christian over such questions. In the other supreme Court of Appeal, the Privy Council, we always have in such questions the inestimable benefit of that assistance. This House has undeniably a right to call for it, and I trust you will call for it, if you are not now prepared to reverse the judgment below.

[ \*742 ]

REG.  
C.  
MILLIS.

LORD ABINGER :

[ \*743 ]

It can hardly be expected of me that I should, in the short time that I have had for deliberating, put the argument I have to submit to your Lordships into the form to which my noble and learned friend has reduced his; or that I should enter upon any elaborate discussion in answer to the very ingenious and the very learned and profound argument which he has just delivered; but yet I think I ought not to shrink from delivering my opinion upon this question, which unfortunately differs from that of my noble and learned friend. When we have so large a majority as we have of the Irish Judges, who heard this subject discussed in the most full and deliberate manner, and when we have the additional authority of almost all the English Judges, after the most elaborate arguments on both sides, I should \*think myself indeed very bold, if, without an investigation which I cannot say I have had an opportunity of making in private upon this subject, I should venture to differ from so many and such profound authorities. And much as I admire the composition and respect the investigating powers of my noble and learned friend, I must say that the argument he has delivered has not convinced me that the learned Judges are wrong.

At the time when the matter was discussed at your Lordships' Bar, I made it my duty to attend deliberately to the various arguments that were adduced on either side. I have since looked at the opinion delivered on behalf of the learned Judges by the LORD CHIEF JUSTICE of the Common Pleas: and I must own that that opinion has confirmed the opinion I originally formed when I heard the arguments at the Bar, that the judgment of the learned Judges in Ireland was right, and to that opinion I still adhere. I shall not enter into an elaborate discussion of the cases or the reasonings adduced by my noble and learned friend. There are but two or three points of his argument to which I shall venture shortly to advert. The question is whether or not a contract of marriage *per verba de presenti* is *ipsum matrimonium*; that is the true question. Now it is admitted by my noble and learned friend that it is not for all purposes attended with the legal consequences of marriage; that it is not good for dower.

LORD BROUGHAM :

No, I do not admit that; it is distinctly denied.

LORD ABINGER :

REG.  
v.  
MILLIS.

Then I have misunderstood my noble and learned friend. I consider, however, that point to have been fully established by the authorities referred to by the Judges.

My noble and learned friend has quoted the case of *Collins v. Jessot* (1), where Lord Holt is supposed to have said that it is a marriage, but that the parties, if they consummate it before the solemnisation *in facie ecclesiæ*, are liable to ecclesiastical censure; that it is *ipsum matrimonium*, but that it is, nevertheless, not a marriage for the purpose of cohabitation. It seems to me very extraordinary to say that a marriage should be valid to all intents and purposes, and yet that it shall not be followed by the immediate object which the parties had in contemplation in the marriage. I mention that as an instance of inconsistency, which either proves that Lord Holt is not correctly represented, or that the interpretation of his opinion is more correctly given by the opinion which the learned Judges have communicated to this House than by the opinion of my noble and learned friend.

[ 744 ]

LORD BROUGHAM :

The learned Judges say that it is good by the canon law.

LORD ABINGER :

It cannot be good, I should think, by any law, if they are liable to censure for consummation, for treating each other as husband and wife. It cannot be that it is lawful matrimony in the eye of God and man, and yet, if the parties cohabit together, they are liable to the censure of the Ecclesiastical Court.

There is one topic which appears to me, after all, the most forcible to which my noble and learned friend has addressed himself, and that is the case of the Quakers and the Jews; and I am free to admit that that question presented very considerable difficulties before the Marriage Act. I am not prepared to say or to admit that before the Marriage Act, the \*marriages of Jews and Quakers were good by the law of this country; but since that Act, I think that under the clause therein which excepts those marriages from the operation of that Act, they are by implication to be deemed good. The Marriage Act itself does not declare that a contract *per verba de presenti* shall be null and void; it only denies to the Ecclesiastical Court, the right, which it before exercised, of

[ \*745 ]

(1) 6 Mod. 155; 2 Salk. 437.

REG.  
v.  
MILLIS.

enforcing marriage in consequence of that contract. If such contracts were actually legal, it leaves those marriages as they were before; it makes no alteration in the actual effect of a contract *per verba de presenti*, by abolishing a particular remedy, and therefore those marriages would still remain lawful marriages; it does not declare the contracts to be null and void, but only declares that the Ecclesiastical Court shall not interfere to compel a solemnisation of marriage upon such a contract; but such marriages, if good before, would still be good, the Act not declaring the contract to be null and void.

There is only one other topic to which I shall address myself on this occasion; that is, respecting the ecclesiastical law of England, upon which the whole foundation of the argument rests. My noble and learned friend seems to consider that the ecclesiastical law of England is to be derived from the ecclesiastical law of the Continent. Now I beg to observe that he has not at all satisfied my mind upon that part of the argument. The learned Judges have, I think, satisfactorily derived it from the constitutions of the ecclesiastical Synods and Councils in England, before the authority of the Pope was acknowledged in this country. I take that part only of the foreign law to be the ecclesiastical law of England, which has been adopted by Parliament or the Courts of this country,  
[ \*746 ] \*from the decretals of Popes and the authority of Councils on the Continent. It is admitted that, by the Constitutions of Lanfranc in the year 1076, there is an express declaration that a marriage shall not be good unless it be solemnised by a priest. The same appears in the laws of King Edmund, at a much earlier period. Then how comes it that that is no longer a part of the law of England?

LORD BROUGHAM:

It is because it is not *in facie ecclesiæ*: it says a priest, not a deacon.

LORD ABINGER:

I do not want to enter into minute differences now, which I think are sufficiently explained by the argument of the Judges; I am only stating the broad lines of argument upon which I proceed, and on which I think the learned Judges are well founded in their opinion, that by the ecclesiastical law of England the presence of a priest, or, since the Reformation, of a person in holy orders, is

necessary to constitute a legal marriage. Those who have taken the trouble to investigate and make written notes of the authorities, have, of course, an advantage over me; I profess to adhere to the opinion which I formed on consideration of the arguments at the Bar. It appears to me that the opinions delivered by the CHIEF JUSTICE, on behalf of the learned Judges, are incontrovertible and conclusive.

REG.  
v.  
MILLIS.

LORD CAMPBELL:

After the most anxious consideration of the opinion delivered by the learned Judges in this case, I am unable to concur in it, and I cannot advise your Lordships to act upon it. I need not express my high respect for the individuals now administering justice in the Courts of Common Law in Westminster Hall, or the reverence with which I must regard whatever is laid down by Lord Chief Justice \*TINDAL; a Judge who, for learning and ability, is not inferior to the most distinguished of his predecessors.

[ \*747 ]

I certainly much regret that, upon a subject of such infinite importance and such great difficulty, the time had not been allowed to the Judges which they themselves stated they considered necessary for duly examining and weighing the conflicting authorities and arguments brought forward at your Lordships' Bar. When you avail yourselves of your privilege of consulting the Judges on any question of law which you have to consider, you generally have the advantage of knowing the reasons by which they are swayed; for they either deliver their opinions *seriatim*, each expressing his own reasons; or the Judge highest in rank, who delivers their unanimous opinion, expresses reasons in which they have all concurred. On this occasion the reasons are the reasons of the CHIEF JUSTICE alone, and we are left entirely in the dark, as to the process by which the others arrived at the conclusion that the first marriage entered into by the prisoner with Hester Graham, before a Presbyterian minister—which both parties intended and believed to be a present valid marriage, and under which they cohabited together for years as man and wife, without any doubt as to its validity—was null and void. In the Courts below, upon questions of great magnitude, it has not been unusual for the different Judges of the Court to give their opinions with their reasons separately, even when they agree in the judgment; of which we have a memorable instance in the case of *Stockdale v. Hansard* (1); and I think your

(1) 48 R. R. 326 (9 Ad. & El. 1),

REG.  
v.  
MILLIS.  
[ \*748 ]

Lordships will not have the full benefit of consulting the Judges unless they deliver their opinions separately, or are understood \*to concur in the reasons assigned by the Judge who delivers their unanimous opinion. It is possible that for the same opinion contradictory reasons might be given, and that the weight to be ascribed to it may be much lessened by those who join in it combating and overthrowing the arguments of each other. In the present case we have particularly to lament that we are informed of the reasoning only of one Judge, as he states that "it was only after considerable fluctuation and doubt in the minds of some of his brethren that they had acceded to the opinion which was formed by the majority." I should have been much gratified and edified by being informed of the course of this fluctuation; what the doubts were which weighed in the minds of those learned persons, and by what train of reasoning those doubts were dispelled.

Now it is most essential that your Lordships should bear in mind the facts found by the special verdict. If George Millis had merely entered into a contract *per verba de presenti* to marry Hester Graham, the parties not considering the engagement a present marriage, and intending that before they lived together as man and wife it should be solemnised by a subsequent ceremony, I should have agreed with the Judges that the man would not have committed bigamy by afterwards marrying another woman. Betrothment is not matrimony. Were a priest in orders accidentally present at such a betrothment, and the parties, instead of intimating before him that they intended to be then married, expressed their intention that it was only an absolute engagement that they should afterwards become man and wife; by whatsoever form of words that engagement might be expressed, this would not have been *ipsum matrimonium*. But the jurors, by the special verdict, say,

[ \*749 ] "that in January, 1829, \*George Millis, accompanied by Hester Graham, spinster, and three other persons, went to the house of the Rev. John Johnstone, of Banbridge, in the county of Down, the said Rev. John Johnstone then and there being the placed and regular minister of the congregation of Protestant dissenters commonly called Presbyterians; and that the said G. Millis and H. Graham then and there entered into a contract of present marriage, in the presence of the said Rev. J. Johnstone and the said other persons, and the said Rev. J. Johnstone then and there performed a religious ceremony of marriage between the said G. Millis and H. Graham, according to the usual form of the

REG.  
v.  
MILLIS.

Presbyterian Church in Ireland; and that after the said contract and ceremony the prisoner and the said Hester for two years cohabited and lived together as man and wife, the said Hester being after the said ceremony known by the name of Millis." Now this was not a mere betrothment; this was not a mere executory contract *per verba de presenti* for a marriage thereafter to be solemnised; this was, as it was meant to be, *ipsam matrimonium*. Here we have not only *pactum*, not merely *sponsalia*, but *nuptiæ per verba de presenti*. I rely upon the distinction between a contract *per verba de presenti* for a marriage to be afterwards solemnised, and *nuptiæ per verba de presenti* without any contemplation of a future ceremony as necessary to complete the relation of man and wife; a distinction (I speak it with the most profound respect) which I think the learned Judges have not sufficiently kept in view. The use of the expression "contract of marriage" is equivocal, and may mean the actual formation of the relation of husband and wife; but it may mean only an irrevocable engagement to be afterwards carried into effect, the parties not meaning then to become husband and \*wife, and their engagement therefore, though words in the present tense are used, not amounting to *nuptiæ*.

[ \*750 ]

This distinction may be illustrated by the decisions respecting leases. The general rule is, that a contract to let land *per verba de presenti* is *ipsa locatio*; the term is instantly created, and the interest vests in the lessee without the execution of a formal instrument of demise; but if it appears to have been the intention of the parties that, till a formal instrument of demise was executed, the relation of landlord and tenant for the stipulated term should not be constituted between them, the instrument containing words of contract *per verba de presenti* is considered only an executory agreement, the specific performance of which may be enforced in a court of equity, and a subsequent lease to another would be good at law till set aside on the ground of the precontract; but where the contract to let *per verba de presenti* is intended by the parties to operate immediately, it is *ipsa locatio*, however informal it may be, and a subsequent lease to another is merely void. In the present case it is clear that the parties contemplated no farther ceremony completely to constitute the conjugal relation between them, and that they at the time of the ceremony intended to become, and believed that they had become, husband and wife.

The only objection that can be taken to the validity of this marriage is, that there was not present at it a priest or deacon



REG.  
v.  
MILLIS.

[ \*751 ]

episcopally ordained, or a person believed by the parties to be a priest or deacon episcopally ordained; and the question arises, whether by the common law of England, which is allowed to be the common law of Ireland, there could not be a valid marriage without the presence of a priest or deacon \*so ordained, or believed by the parties to be so ordained. The condition contended for as indispensable to the validity of marriage, is the presence of a person believed by the parties to be in priest's or deacon's orders. It is not considered essential that he should pronounce a benediction, or join in any religious ceremony; and though he never was episcopally ordained either as priest or deacon, his presence is sufficient, if the parties believe that he is in priest's or deacon's orders: while a marriage celebrated by a clergyman who is actually in Presbyterian orders, and who is believed by the parties to be entitled by the law of God and the law of the land to marry them effectually, is a nullity. Such is the common law contended for by the counsel for the prisoner; but surely the *onus* lies on those who maintain that such is the common law, to make out their proposition by decided cases and text writers of authority.

[ \*752 ]

I must be allowed to point out to your Lordships the extreme improbability of the common law of England requiring the presence of a priest to the validity of marriage. I think it is quite clear that by the general law prevailing in the Western Church prior to the Council of Trent,—although a marriage, to be regular, ought to have been *in facie ecclesie*,—for a marriage to be valid, so that the parties would not be considered as living together in fornication, and their issue would be legitimate, the presence of a priest was quite unnecessary. Marriage, as a sacrament, was considered a matter of ecclesiastical jurisdiction; the validity of marriage was decided in the Ecclesiastical Courts; from those Courts there was an appeal to Rome as a common *forum*. The proceedings in the divorce suit between Henry VIII. and Catharine of Arragon afford the most recent and the most striking \*instance of the law of marriage in England being considered as governed by the law of marriage prevailing in other Christian countries.

Now, that by the general marriage law of Europe, before the Reformation and before the Council of Trent, there might be a valid marriage without the presence of a priest, is clearly demonstrated by the canonists cited at the Bar. I will confine myself to two authorities as quite sufficient for this purpose. In the work of John de Burgh (a canonist of the highest reputation), intitled

REG.  
C.  
MILLIN.

“Pupilla Oculi,” there is a chapter “De sacramento matrimonii,” in which we find this doctrine expressly laid down: “De ministro hujus sacramenti notandum est quod non requiritur alius minister distinctus ab ipsis contrahentibus; ipsimet enim ut plurimum sibi ipsis ministrant hoc sacramentum, vel mutuo vel uterque sibi. Patet etiam quod ad collationem hujus sacramenti non requiritur ministerium sacerdotis, et quod illa benedictio sacramentalis, quam solet presbyter facere sive perferre super conjuges, sive aliæ orationes ab ipso probatæ, non sunt forma sacramenti, nec de ejus essentia, sed quoddam sacramentale ad ornatum pertinens sacramenti.” He afterwards goes on to state that marriage ought to be solemnised openly before a priest, but intimates that a clandestine marriage, where no priest is present, is binding and valid in law. Fernando Walter, now a professor in the University of Bonn, in his treatise on the Canon Law, a work highly esteemed on the Continent of Europe, speaking of the decree of the Council of Trent on this subject, says: The provision is new that both parties must declare their intention before their proper parochial minister and at least two witnesses; this form is declared so essential that without it the marriage is \*altogether void; but yet the object is only to secure a trustworthy witness in order to the precise ascertainment of the marriage, wherefore the persons mentioned need not have been expressly invited to be present. Nay, even the opposition of the parochial minister does not prevent the validity of the marriage, if he has merely heard the declaration. He goes on to explain the difference between a regular marriage before a priest and a clandestine marriage without a priest, but considering them equally effectual: he says, “Marriage is a contract which ought, according to the ancient usage, to be confirmed by the priestly benediction; and properly this ought to be given by the proper parochial minister, or some one authorised by him according to the rules of the Church. Other ceremonies are also to be observed. None of all this, however, is essential to the validity of the marriage.” The decree of the Council of Trent respecting the solemnisation of marriage, requires the presence of the parish priest or some other priest specially appointed by him or the Bishop; but, even under this decree, the priest is present merely as a witness; it is not necessary that he should perform any religious service, or in any way join in the solemnity. This view of the subject is illustrated by the case of *Lord and Lady Herbert* (1). They were married in

[ \*753 ]

(1) 3 Phill. 58; 2 Hagg. Cons. Rep. 263.

REG.  
C.  
MILLIS.

[ \*754 ]

[ \*755 ]

Sicily, where the decree of the Council of Trent is received. They got the parish priest to attend at the house of the lady, and two of her servants were called up. In the presence of these witnesses she said, "I take you for my husband;" and he said, "I take you for my wife." Nothing more passed, and this was held to be a valid marriage in Sicily, and therefore all the world  
 \*over. It thus appears quite certain that, according to the doctrine of the Roman Catholic Church, no religious ceremony was or is necessary to the constitution of a valid marriage. Although marriage is considered a sacrament, this sacrament, like baptism, might be administered, under certain circumstances, without the intervention of a priest; the parties being liable to be censured for the irregularity of dispensing with the conjugal benediction and neglecting to make the proper offering to the Church. There is not a trace in any ecclesiastical writer, of the law of marriage in England being different from the law of marriage in other Christian countries. I earnestly entreat your Lordships to bear in mind that I by no means say every contract of marriage using words *de presenti* was *ipsum matrimonium*; on the contrary, in England, and I believe in the rest of Europe, an absolute engagement to become man and wife at a future time did not amount to present marriage; but if the parties had wished and intended to enter into present marriage without the presence of a priest, they might have done so, subject to Church censures for irregularly contracting the relation of man and wife,—not for living together in sin;—and I will use the freedom to make an observation upon what has fallen from my noble and learned friend who last addressed your Lordships, who would infer that the parties who have contracted *per verba de presenti* were not man and wife till the marriage was celebrated, because Lord HOLT says that the parties might be liable to censure if they lived together before the celebration of marriage. Now, I believe it is not disputed that in Scotland there may be a valid marriage *per verba de presenti* without the intervention of a priest; and I can state of my own knowledge,—being the son \*of a minister of the Church of Scotland, and having myself been present at such proceedings,—that the parties who have been living together as man and wife after an irregular marriage are considered as liable to Church censure, and are not admitted to the communion of the Church until they have been censured, and have expressed their regret for not having complied with the rules of the Church; but that the marriage is *ipsum matrimonium* has never been doubted.

THE LORD CHANCELLOR :

REG.  
v.  
MILLIS.

Suppose there is a contract *per verba de presenti*, and nothing further,—no cohabitation; would the Church under such circumstances interfere by its censures?

LORD CAMPBELL :

That case has not come within my observation. The cases to which I refer, and which are not at all unfrequent, are those of a runaway or what is called a half-mark marriage, where the parties contract *per verba de presenti*, and where they live together as man and wife, and are unquestionably man and wife, and where the children would be legitimate if the parents died without any further ceremony; that was decided by your Lordships' House in the case of *MacAdam v. Walker* (1), where the man shot himself the instant he declared that the woman he had married was his wife. In those cases still the Church considers the marriage as irregular, and summons the parties before the Kirk Session, and rebukes them for not having observed the rules of the Church.

LORD BROUGHAM :

I have heard the censure of a clergyman for solemnising a marriage without publication of banns, which is reckoned irregular; but I \*never heard of parties being liable to rebuke, or that they have come before the congregation or Kirk Session, for merely marrying privately without cohabiting.

[ \*756 ]

LORD CAMPBELL :

It is for living together as man and wife without having been married by a clergyman, that the censure is pronounced.

But to show that there was a peculiar law in England on this subject, even in the time of the Anglo-Saxons, there is cited to us a supposed law of King Edmund, directing "that at the nuptials there shall be a Mass priest, who shall, with God's blessing, bind their union to all prosperity." Setting aside the grave doubts which have been entertained of the genuineness of this document, does it show, that while a Mass priest is directed to be present at nuptials, nuptials without the presence of a Mass priest would be void, and that this ever after was the law of England? Then is a marriage void that is celebrated by a deacon?

REG.  
C.  
MILLIS.

for he is not a Mass priest, and his presence would as little satisfy the law as that of the verger or the sexton.

[ \*757 ]

There were then cited to us numerous decrees of provincial Councils on the subject of marriage, the great object of which was to discourage clandestine marriages, and to require that all marriages should be celebrated in the face of the Church; but there is no reason to suppose that the prelates who presided at these Councils, many of whom were foreigners, intended to introduce any law touching the essentials of marriage different from what prevailed in the rest of Christendom; they were only in the nature of bye-laws, to be observed in a particular diocese or province, to prevent as much as possible all clandestine marriages, either with or without the intervention of a priest. I believe there is only one of these Constitutions, that of Archbishop Lanfranc in the year 1076, \*which professes to nullify a clandestine marriage, by declaring that a marriage without the benediction of the priest should not be a legitimate marriage, and that other marriages should be deemed fornication. But this denunciation goes further than the law is supposed ever to have gone: for the blessing of the priest was not essential to the validity of the marriage if he was present, and the denunciation may rather be taken to be *in terrorem* than as making or declaring the law.

The different decrees against clandestine marriages seem to me to have no cogency to show that there was in England any peculiarity respecting the law of marriage as held by the Ecclesiastical Courts. These decrees, if they were supposed to apply to the validity of the marriage, are contrary to the plainest propositions of canonists, both foreign and native, and to the universal practice of Christendom. The existence of such a peculiarity seems wholly inconsistent with the procedure by which that law was administered. The Church of Rome, in every country under its jurisdiction, was most anxious that marriages should be publicly celebrated in the presence of a priest; first, for the laudable object of preventing imprudent unions by which the peace of families might be disturbed; and secondly, for the excusable object of collecting fees from the faithful. It was proved before your Lordships' Committee on the Law of Marriage in Ireland, that a principal part of the emoluments of the Roman Catholic clergy in Ireland now arises from fees on marriages, and that for this reason they are celebrated at the times, in the places, and under the circumstances when it may be expected that the contributions

will be most bountiful. But till the Council of Trent, when marriages were absolutely required to \*be before the parish priest, or some other person duly authorised by the Bishop or the parish priest to officiate,—and all other marriages were declared to be null,—the doctrine of the Church of Rome certainly was that there might be a valid marriage without the intervention of a priest; and if that was so, it was hardly possible that any different law should prevail in any State subject to her jurisdiction.

REG.  
v.  
MILLIS.  
[ \*758 ]

In England the common-law Judges professed, with respect to marriage, to be governed by the Ecclesiastical Courts; those Courts alone took direct cognisance of the validity of marriage; and when the question arose incidentally before the common-law Judges, they referred themselves to the Bishop as the ecclesiastical Judge, and were governed by the certificate which he returned. Upon some occasions the validity of marriage arose as a question before the common-law Judges when they could not consult the Bishop. On such occasions they would have regard to the ecclesiastical law, and decide accordingly: but the Bishop would not on any occasion disregard the general ecclesiastical law, and be guided by any different rules laid down by the Courts of Common Law.

Let us now see whether there are any common-law decisions to the effect that there cannot be a valid marriage without the presence of a priest. I must again remind your Lordships that this is the question, and not whether a mere executory contract to marry constitutes marriage. There has been cited to us from Lord HALE's Manuscripts the note of a case (1) supposed to have been decided in the reign of Edw. I., the statement of which is so scanty and obscure that I think no weight can safely be given to it as an exposition \*of the law in that reign. We are not told how A. contracted with B., or that any ceremony or form intended as spousals passed between them. It is said that A. married C., from which it may be inferred that he did not intend that his contract with B. should operate as a present marriage, and that his contract with her, although *per verba de præsenti*, was only meant to be executory. However, in the Court in which the action was originally brought, it was held that B. was dowable of the lands in question, which could only be on the ground that A. and B. were husband and wife from the time of the contract, for the marriage could not possibly date from the sentence of the Ordinary. The judgment was reversed "*coram Rege et Concilio*." This is

[ \*759 ]

(1) Co. Litt. 33 a, n. 10.

REG.  
v.  
MILLIS.

suggested at the Bar to have been on a writ of error in Parliament. There can be no doubt that one of the King's Councils at that time consisted of the Chancellor, the Treasurer, the Barons of the Exchequer, the Judges of either Bench, with the King's Serjeant and the King's Attorney-General, and that they assisted in deciding cases brought before Parliament; but I am not aware that a writ of error in Parliament was ever said to be *coram Rege et Concilio*. On the contrary, my Lords, this was the style of the Star Chamber, and I conceive that the case must be considered as an instance of the irregular interference by the King and his Privy Council with the ordinary administration of justice: the reversal of the judgment may have been out of favour to D., to whom the feoffment was made by A. after he was excommunicated. Lord HALE adds, "Neither the contract nor the sentence was a marriage." The sentence could not be a marriage, no more could the contract, if it was intended not as *nuptiæ*, but only as an engagement to marry.

[ 760 ]

Then come the two cases of *Foxcroft* and *Del Heith*, and I must express my astonishment that any reliance should be placed upon them in support of the proposition that marriage without a priest is void. If they prove anything, they prove that marriage by a priest is void unless celebrated *in facie ecclesiæ*. *Foxcroft* was married in a private chamber by the Bishop of London, and the only objection taken to the validity of the marriage was, that it did not take place in a church or chapel, and that it was without the celebration of Mass. *Del Heith's* case is precisely the same in its leading facts; there was not a mere contract *per verba de præsentì*, but *nuptiæ* were actually celebrated. *Del Heith* was solemnly married to the woman by his parish priest; and because the marriage was in a private chamber, and not *in facie ecclesiæ*, the son born after the marriage was adjudged a bastard. Can these cases have been decided according to the law of England as it stood in the reign of Edw. I.? Was a marriage solemnised by a priest in orders or by a Bishop in a private chamber absolutely void? If so, when was the law introduced by which it was made void? It is not pretended that in the time of the Anglo-Saxons more was required than a benediction by a Mass priest, which might as well be given in a private chamber as in a church or chapel. If in the reign of Edw. I. all marriages were void except such as were celebrated in the face of the Church, when and by what authority did private marriages by a priest in orders become valid? Could an ecclesiastical canon, sanctioned by the Pope, without the consent of

the King and Parliament, effect the change? If it could, where is any such canon to be found?

REG.  
C.  
MILLIS.

I had always thought that these two cases had been allowed to have been decided contrary to law, and I have no doubt that they were so. They may now be \*cited quite as much to show that a marriage is void by the canon law if privately solemnised by a Bishop, as that an actual marriage is void without the presence of a priest. They prove a great deal too much, or they prove nothing at all. But I cannot dismiss them without this observation, which they fully illustrate, that you cannot safely take the law upon such a subject from two or three cases, supposed to have been decided in very remote times, which may be misreported, and which may be the result of haste, violence, or corruption. I should cite *Foxcroft's* and *Del Heith's* cases to show that the law upon such a question may best be learned from text writers of authority, calmly and deliberately and impartially speaking the general opinion of the legal profession at the time when they were published. In no writer, lay or ecclesiastical, is it said that a marriage privately solemnised by a priest is void, or that a marriage is void there being no priest present. It is laid down that a second marriage by a man already married is void, while a marriage after a contract *per verba de presenti* is only voidable. This shows that the mere executory contract, although indissoluble, is not marriage; but does not show that there might not have been a complete marriage without a priest, had the parties so wished and intended.

[ \*761 ]

The authority of Perkins has been greatly relied upon at the Bar, as showing that unless there be a marriage by a priest, the woman shall not have dower. Now, without considering whether this may mean dower *ad ostium ecclesiæ*, I would first question whether the right to dower would be a certain test of marriage. For the Church, the test is whether the parties are considered as living together in lawful wedlock; and for the lay tribunals, whether the issue \*be legitimate. But I think it is quite clear that the woman who, according to Perkins, shall not have dower, is a woman who had entered into an executory contract of marriage to be afterwards solemnised; for he says (s. 306), "If a man seised of land in fee make a contract of matrimony with J. S., and he dies before the marriage is solemnised between them, she shall not have dower, for she never was his wife." Does he not, in the most explicit manner, intimate that, according to the intention of the parties, the contract of matrimony between them was to be afterwards solemnised; that

[ \*762 ]



REG.  
v.  
MILLIS.

they never intended the contract to operate as marriage, and that, till the solemnisation, they were not to live together as man and wife? Wherever Perkins uses the expression "contract of marriage," he places it in opposition to actual marriage; as in title "Feoffments," where he says, "If a contract of marriage be between a man and a woman, yet one of them may enfeof the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnised betwixt them, the man unto whom she was contracted shall not have the goods of the wife as her husband." He is here plainly speaking of an engagement to marry. Bracton, on the contrary, when he is considering the subject of gifts between husband and wife, supposes the parties to be married whether they marry with or without the forms of the Church, their intention being to enter into the married state: "*Matrimonium autem accipi possit, sive sit publice contractum vel fides data quod separari non possunt, et re vera donationes inter virum et uxorem constante matrimonio valere non debent.*" With the plighting of troth, which he supposes to take place without any public ceremony, the parties come together as man and wife, so that they \*cannot be separated. This is totally different from the contract of Perkins to be afterwards solemnised, and is attended with totally different consequences.

[ \*763 ]

The next case much relied upon at the Bar was *Bunting v. Lepingwell* (1): and supposing that Bunting and Agnes Addishall had gone through the form of a present marriage without the presence of a priest, or had said or done anything which they intended to operate as present marriage, the case would have been very important; for on that supposition, if I am right in supposing that by the common law the presence of a priest was not necessary to the validity of marriage, no doubt could have arisen as to the legitimacy of Charles Bunting, the second marriage being absolutely void, and there being no occasion for any sentence of the Ecclesiastical Court to set it aside, or "*quod prædicta Agnes subiret matrimonium cum præfato Bunting.*" But in referring to the special verdict it is quite clear that Bunting and Agnes, although they used *verba de præsentis*, did not thereby mean to become man and wife, but merely entered into an absolute engagement to solemnise a marriage between them at a future time; it was only an executory contract; and when Agnes had taken Twede to husband, Bunting libelled her on the contract. Bunting and she under this engagement never had lived together, or intended to live together, as man and wife; their engagement,

therefore, was only in the nature of a precontract, which might then be enforced in the Ecclesiastical Court, and which rendered a subsequent marriage with another voidable, but which did not in itself amount to a marriage. But where is the case in \*which it has been held that if parties intend to enter into the state of matrimony, and use a ceremony *per verba de presenti*, and live together as man and wife, and believe that they are lawfully united in holy wedlock, this was a mere executory contract; that a subsequent marriage by one of them during the life of the other would not be void; and that such a subsequent marriage must be set aside on the ground of precontract? I quite agree that the contract actually entered into between Bunting and Agnes neither constituted, nor was ever intended to constitute, a complete marriage, without the intervention of a religious ceremony.

REG.  
v.  
MILLIS.

[ \*764 ]

The case of *Weld v. Chamberlaine* (1) is relied upon by both sides; Chief Justice PEMBERTON having there held that a marriage by an ejected minister, without a ring, and without following the ritual of the Church of England, was valid. But I cannot help thinking that the opinion of the CHIEF JUSTICE was chiefly influenced by the consideration that this was not a mere contract to marry hereafter; that both parties intended at the moment to enter into the married state; that *nuptiæ* had been celebrated between them; and that he would have given the same effect to the ceremony, if, instead of an ejected minister who had been episcopally ordained, but was not then recognised by the Church, the clergyman present had been ordained by the imposition of hands of several ejected ministers, or, in other words, a Presbyterian minister.

The only other case much relied upon by the counsel for the prisoner was *Haydon v. Gould* (2). Here there was an actual marriage, and the man and the woman intended to become husband and wife, and believed that they were so, and lived together as such for \*seven years, till she died. They were of a sect called Sabbatarians, and were married by one of their ministers in a Sabbatarian congregation, and used the form of the Common Prayer, except the ring. Had there been a decision of a court of law that this was no marriage, and that the issue were illegitimate, it would have been expressly in point; but the case was only in the Ecclesiastical Court, and the only question there was, whether the husband was entitled to administration. It was held in the Prerogative Court, and confirmed by the Delegates, that the husband could not demand

[ \*765 ]

(1) 2 Show. 300.

(2) 1 Salk. 119.

REG.  
v.  
MILLIS.

administration from the Ecclesiastical Court, as he had not been married according to the forms of the Church, "though perhaps it should be so that the wife, who is the weaker sex, or the issue of this marriage, who are in no fault, might entitle themselves by such marriage to a temporal right." The Delegates, therefore, who allowed the husband to be punished for his nonconformity to the Church, instead of deciding the marriage to be void, appear to have intimated an opinion that under it the wife would have been entitled to dower, and the children would have been legitimate. The reporter, it is true, adds, the constant form of pleading marriage is, "*per presbyterum sacris ordinibus constitutum.*" But if this were the only form, it would exclude marriages by a deacon, which are now admitted to be valid. Had there been a reference to the Court which decided *Haydon v. Gould*, pending a real action involving the question of the legitimacy of the eldest son, there is reason to suppose the certificate would have been that he was born *in justis nuptiis*; and I make no doubt that in such a case such an answer would have been returned by the Bishop in early times, when it was the universal opinion of the \*Western Church that to administer the sacrament and to constitute the bond of marriage, the presence of a priest was unnecessary. With respect to the refusal of administration to the husband, I am by no means clear that the same decision would not have taken place under a clandestine marriage by a Roman Catholic priest.

[ \*766 ]

*Beau Fielding's* case is exceedingly entertaining to read, but throws no light upon the present controversy, as no question arose as to the validity of the first marriage, and his guilt depended upon the credit of the witnesses who swore to the second.

The *Sabbatarian* case was decided in the ninth year of Queen Anne, and I will venture to say, that from that time downwards till the present controversy arose, above 130 years, the opinion of all the greatest Judges who have presided in Westminster Hall and in Doctors' Commons has been, that by the common law the presence of a priest in orders was not indispensably necessary to the celebration of a valid marriage.

In *Jesson v. Collins* (1), we have the *dictum* of that distinguished Judge Lord HOLT, "that a contract *per verba de presenti* was a marriage." He, no doubt, meant where it was intended to operate as a present marriage, and he expressly excluded the presence of a priest. It seems to me plain that by a marriage, he must be

understood to intend a marriage by the common law of the land. It has been supposed that this could not be his meaning, because in *Wigmore's* case he says, "by the canon law, a contract *per verba de presenti* is a marriage." Both propositions are true, and both are consistent. The common law adopted \*that maxim of the canon law with respect to the validity of marriages. This will be found to be the opinion and the language of Sir W. Scott, the Judge of the highest authority on this subject who has ever presided in an English Court of Justice. HOLT appears to have said in *Wigmore's* case, as was said by the Delegates in *Haydon v. Gould*, that to entitle the parties to all the privileges attending legal marriage, marriages ought to be solemnised according to the rights of the Church of England; but he gives no countenance to the notion that the marriage by the minister of the congregation who is not in orders is a nullity, and that the children would be bastards. We have the authority of Mr. Justice GOULD, Mr. Justice POWIS, and that distinguished Judge Mr. Justice JOHN POWELL, to the same effect as that of Lord HOLT; for according to the report of *Jesson v. Collins* under the name of *Collins v. Jessot* (1), the CHIEF JUSTICE saying, "If a contract be *per verba de presenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*;" the reporter observes that to this the whole Court agreed, "*quæ omnia tota Cur. concess.*"

REG.  
v.  
MILLIS.

[ \*767 ]

I do not find the subject again discussed till the publication of Blackstone's Commentaries; where, if any where, we may look to find the principles of our jurisprudence. If he has fallen into some minute mistakes in matters of detail, I believe upon a great question like this, as to the constitution of marriage, there is no authority to be more relied upon. He began, before the Marriage Act, to read the Lectures \*at Oxford, which became the Commentaries, but did not publish them till after, and his attention must have been particularly directed to the law of marriage. Does he say that at common law marriage could not be contracted in England without the intervention of a priest? His words are, "Our law considers marriage in no other light than as a civil contract; the holiness of the matrimonial state is left entirely to the ecclesiastical law" (2). He lays it down in the most express terms that, before the Marriage Act, in England a marriage *per*

[ \*768 ]

(1) 6 Mod. 155.

(2) 1 Bl. Comm. 437.

REG.  
v.  
MILLIS.

*verba de presenti*, without the intervention of a priest, was *ipsum matrimonium*. He says that for many purposes it was marriage; it must have been marriage to make the children legitimate, for that is the test by which a valid marriage is to be determined; and if it makes the children legitimate, there can be no doubt it would be valid so as to make the person who has entered into it liable for the penalties of bigamy if he enters into a second marriage. He mentions Lord Hardwicke's Act (26 Geo. II. c. 38); he then says, "Much may be and much has been said both for and against this innovation upon our ancient laws and constitution." He adds, "any contract made *per verba de presenti*, or in words of the present tense, and, in case of cohabitation, *per verba de futuro* also, between persons able to contract, was before the late Act deemed a valid marriage to many purposes." This passage is to be found in the 25 editions of his work, which has now for a period approaching to a century taught the law of England to this country and to all civilised nations who have had any curiosity to inquire into our polity.

[ 769 ]

At last came the case of *Dalrymple v. Dalrymple* (1), which was for many years understood to have finally settled the law by judicial decision. I believe it is universally allowed that Lord STOWELL was the greatest master of the civil and canon law that ever presided in our Courts, and that this is the most masterly judgment he ever delivered. I have read it over and over again, and always with fresh delight. For lucid arrangement, for depth of learning, for accuracy of reasoning, and for felicity of diction, it is almost unrivalled. Although it seems to flow from him so easily and so naturally, it is evidently the result of great labour and research. Luckily he had full leisure to mature his thoughts upon the subject, and satisfactorily to explain to us the authorities and arguments on which his opinion was founded. Your Lordships are aware that the case turned upon the validity of a marriage in Scotland, *per verba de presenti*, without the intervention of a clergyman, and it became essential to consider what was the general law respecting the manner in which marriage was contracted. Your Lordships will find he clearly lays it down that there was the same law on the subject all over Europe, and that, till the Council of Trent, by this law there was no necessity for the intervention of a priest to constitute a valid marriage. Among other things to the same effect, he says, "The law of the Church, although in conformity

to the prevailing theological opinion it revered marriage as a sacrament, still so far respected its natural and civil origin as to consider that where the natural and civil contract was formed, it had the full essence of matrimony without the intervention of the priest; it had even in \*that state the character of a sacrament, for it is a misapprehension to suppose that this intervention was required as matter of necessity even for that purpose before the Council of Trent. It appears from the histories of that Council, as well as from many other authorities, that this was the state of the earlier law till that Council passed its decrees for the reformation of marriage. Such was the state of the canon law, the known basis of the matrimonial law of Europe. The canon law, as I have before described it to be, is the basis of the marriage law of Scotland, as it is of the marriage law of all Europe. It becomes of importance, therefore, to consider what is the ancient general law upon this subject; and on this point it is not necessary for me to restate that by the ancient general law of Europe, a contract *per verba de presenti*, or a promise *per verba de futuro cum copula*, constituted a valid marriage, without the intervention of a priest, till the time of the Council of Trent."

REG.  
T.  
MILLER.

[ \*770 ]

Lord KENYON had before laid down the same doctrine, though in a less peremptory manner: "I think," he says, "though I do not speak meaning to be bound, that even an agreement between the parties *per verba de presenti* is *ipsum matrimonium*": *Reed v. Passer* (1). But ever since *Dalrymple v. Dalrymple*, every Judge who has touched upon the subject has unhesitatingly adhered to the law as there laid down by Lord STOWELL. In *Lautour v. Teesdale*, Lord Chief Justice GIBBS says (2), "The judgment of Sir W. SCOTT in *Dalrymple v. Dalrymple* has cleared the present case of all the difficulty which might at a former time have belonged to it. From the reasonings there made use of, and from the authorities cited by \*that learned person, it appears that the canon law is the general law throughout Europe as to marriages, except where that has been altered by the municipal law of any particular place. From that case, and from those authorities, it also appears that before the Marriage Act, marriages in this country were always governed by the canon law, which the defendants, therefore, must be taken to have carried with them to Madras. It appears also that a contract of marriage *per verba de presenti* is considered to

[ \*771 ]

(1) 3 R. R. 696 (1 Peake, N. P. Cas. 231, first ed.; 303, new ed.).

(2) 17 R. R. 518, 524 (8 Taunt. 837; 2 Marsh. 243).

REG.  
v.  
MILLIS.

be an actual marriage, though doubts have been entertained whether it be so unless followed by cohabitation."

In *Rex v. Brampton* (1), which turned upon the validity of a marriage contracted in a part of St. Domingo occupied by the English army, Lord ELLENBOROUGH says, "I may suppose, in the absence of any evidence to the contrary, that the law of England, ecclesiastical and civil, was recognised by subjects of England in a place occupied by the King's troops, who would impliedly carry that law with them. It is then to be seen whether this would have been a good marriage before the Marriage Act. Now certainly a contract of marriage *per verba de presenti* would have bound the parties before that Act."

[ \*772 ]

In *Smith v. Maxwell* (2), tried before Lord Wynford, Chief Justice of the Common Pleas, where a question was made respecting the validity of a marriage in Ireland which had been celebrated by a dissenting minister in a private house, he observed, "I am aware of no Irish law which takes marriages performed in that country out of the rules which prevailed in this before the passing of that Act, and which, as it is said \*in the case of *Dalrymple v. Dalrymple*, are common to the greater part of Europe. That case has placed it beyond a doubt that a marriage so celebrated as this has been, would have been held valid in this country before the existence of that statute." That was a marriage celebrated in Ireland by a Presbyterian minister (3).

THE LORD CHANCELLOR :

Between what parties ?

LORD CAMPBELL :

That would be quite immaterial. Lord WYNFORD says, "this marriage would have been valid in England before the Marriage Act." And in England there is no statute which makes any distinction as to the religious persuasion of the parties married by a dissenting minister.

THE LORD CHANCELLOR :

So far it is a *dictum*.

(1) 10 R. R. 299 (10 East, 282).

(2) 1 Ry. & Moo. 80.

(3) The report in Ryan & Moody

describes him as a clergyman of the Church of England.

LORD CAMPBELL :

REG.  
v.  
MILLIS.

But as far as respects this marriage in Ireland it is expressly in point. He says, "there can be no doubt that a marriage so celebrated (that is by a Presbyterian minister in a private house) would have been valid in England before the existence of the Marriage Act." In *Beer v. Ward* (1), another case on the validity of a marriage in England before the Marriage Act, Lord TENTERDEN laid it down distinctly, that if the parties in the presence of witnesses formally acknowledged themselves to be man and wife, that before the Marriage Act constituted a marriage valid in law, and that the issue would be legitimate. He said, "As I understand the law before the Marriage Act, a marriage might be even celebrated without a clergyman, upon a declaration by the parties, in terms of the contract, that they were man and wife, accompanied by cohabitation as man and wife. A contract verbally made before witnesses, and a \*declaration of that in the presence of witnesses, would, at that time of our history, have made a good and valid marriage in England, as it does now in Scotland."

[ \*773 ]

THE LORD CHANCELLOR :

That is not in print.

LORD CAMPBELL :

It is not in print, but it is taken from the shorthand writer's notes, authenticated by *Mr. Serjeant Clarke*, who was counsel in the cause.

THE LORD CHANCELLOR :

I certainly heard him express himself to that effect.

LORD CAMPBELL :

Here then we have a most positive declaration by Lord TENTERDEN, a most cautious Judge and most attentive to the rights of the Church, that before the Marriage Act the law of England and the law of Scotland upon this subject were the same; and that in England, if parties came together and declared that they were man and wife, and lived together as man and wife, they were married to all intents and purposes.

The doctrine of Lord STOWELL in *Dalrymple v. Dalrymple* has been recognised by all his successors, and I have reason to believe

(1) See p. 279 below.



REG.  
v.  
MILLIS.

is at this day approved of both by the Judges and the Bar in Doctors' Commons. In *Wright v. Elwood* (1), Sir HERBERT JENNER, the present Dean of the Arches, a most learned civilian, and most cautious as well as laborious Judge, says, "Before 26 Geo. II. c. 38, marriages without publication of banns or any religious ceremony, contracts *per verba de presenti*, might be good and valid, though irregular; the parties and the minister might be liable to punishment, but the *vinculum matrimonii* was not affected."

[ \*774 ]

Now I come to criminal cases. In criminal as \*well as in civil proceedings, the validity of a marriage by the common law, celebrated without the intervention of a priest in episcopal orders, has been repeatedly recognised by judicial decision. Lathroppe Murray was convicted of bigamy at the Old Bailey, in the year 1815. The case turned on the legality of the first marriage, which was celebrated in Ireland by a Presbyterian minister. The prisoner was a member of the Established Church, the woman to whom he was married a Dissenter; the facts were the same as here. The Recorder of London, after consulting the Judges, held the first marriage to be valid. The prisoner petitioned the House of Commons to interfere in his favour, on the ground that the first marriage was invalid. On that occasion, *Sir Samuel Shepherd*, then Solicitor-General, a most learned and accurate lawyer, and then, I may say, speaking judicially, observed, "That in his opinion and that of the Attorney-General, after having examined every Act of Parliament in Ireland respecting the validity of the marriage ceremony, the first marriage was a legal one. That certain very eminent civilians in Ireland had been consulted several years before respecting that marriage, all of whom declare it was a legal marriage, and that he had no doubt as to the legality of the conviction." This is the identical case of *Reg. v. Millis*.

In Ireland there have been many convictions for bigamy, the marriage having been by a dissenting minister, and both parties not Dissenters. I will mention a few, of which I have MS. authentic reports. In the case of *Rex v. H. Marshall*, tried at Enniskillen Spring Assizes, 1828, before Baron M'Clelland, the first marriage was by a Presbyterian clergyman, the prisoner being a member of the Established Church; the \*prisoner was convicted. In *Rex v. Wilson*, tried at Armagh Summer Assizes, 1828,

[ \*775 ]

before Mr. Justice Torrens, the first marriage was unquestioned ; the second was celebrated by a Presbyterian clergyman, the prisoner being a member of the Established Church, and the woman a Presbyterian ; the prisoner was convicted. In *Reg. v. Halliday*, tried at Donegal Spring Assizes, 1838, before Mr. Baron Pennefather ; the prisoner being indicted for bigamy, a Presbyterian minister was produced on the part of the Crown to prove the celebration of the first marriage by himself. The prisoner was a member of the Established Church, the woman a Presbyterian. The counsel on behalf of the prisoner contended that such a marriage was invalid ; but Mr. Baron PENNEFATHER said he considered such a marriage in Ireland to be perfectly good, and directed the jury accordingly. The prisoner was acquitted ; but the reason was that the witnesses to one marriage did not sufficiently identify him. In *Reg. v. Robinson*, tried at Cavan Spring Assizes, before Mr. Baron Foster, the prisoner was indicted for bigamy : it was proved for the Crown that the prisoner and both wives were Protestants ; that the first marriage was solemnised by a seceding clergyman ; that the prisoner cohabited with his first wife, who was then living ; that the second marriage was solemnised by a person who had been duly ordained by the synod of Ulster, and had a congregation, but was removed from it, and ceased to be a member of the Presbyterian Church before this marriage. The counsel for the prisoner submitted that there was not legal evidence of the second marriage, the person who performed the ceremony not being qualified, inasmuch as he had withdrawn from the Presbyterian congregation and synod, and should therefore be \*considered as a layman. The counsel for the Crown contended, that even if the ceremony were performed by a layman that it would be valid, and cited *Rex v. Marshall*. Mr. Baron FOSTER, after conferring with Baron PENNEFATHER, held that the marriage in question was good. The prisoner was found guilty. In *Rex v. M'Laughlin*, tried at Antrim Spring Assizes, 1831, before Mr. Justice Moore, for bigamy ; the prisoner, being a member of the Established Church, was married to a Presbyterian woman by a Presbyterian minister ; afterwards, during her life, he was again married by a Presbyterian minister to another Presbyterian woman. It was argued for the prisoner that the marriages were illegal, as having been celebrated by Presbyterian ministers, though one of the parties belonged to the Established Church. Judge MOORE declared both marriages legal, and added that the

REG.  
v.  
MILLIS.

[ \*776 ]

REG.  
v.  
MILLIS.

[ \*777 ]

point had been so often ruled by the Judges on the circuits, that he had scarcely expected to hear it raised. The prisoner was convicted, and transported for seven years. In *Reg. v. Daniel Ancruey*, tried at Down Summer Assizes, 1841, before Mr. Justice Crampton, on an indictment for bigamy; Mary O'Hara proved that she saw the prisoner married, about three years before, to Margaret Berry, by Mr. Murray, the Roman Catholic priest of Newry, in the Roman Catholic chapel of that town, and that said Margaret is still alive. John Conroy swore that he knew prisoner and said Margaret to live together as man and wife; that in May last, prisoner said he had got a divorce from her; and that witness then accompanied him in the evening, and saw him married to Margaret Courtney, by the Rev. Mr. Weir, Presbyterian minister in Newry. Margaret Courtney stated that she was and is a \*Presbyterian; she left prisoner at the end of a week, on discovering his first marriage. The prisoner was convicted, and sentenced to 12 months' imprisonment with hard labour; which punishment he underwent.

These are the criminal cases to which I beg to draw your attention; and I ask are we now to be told that all these convictions were illegal, and that if, upon a second conviction, there had been a counter plea to the prayer of clergy, the Judges who gave effect to it would have been guilty of murder? I refrain from citing the passages from Chief Baron COMYNS's and other abridgments of the common law, to show the constant opinion of the profession in this country; but I cannot refrain from asking your Lordships to consider how the subject has been viewed by our brethren in the United States of America. They carried the common law of England along with them, and jurisprudence is the department of human knowledge to which, as pointed out by Burke, they have chiefly devoted themselves, and in which they have chiefly excelled. Their two greatest legal luminaries are Chancellor Kent and Professor Story. In Kent's Commentaries I find this passage: "No peculiar ceremonies are requisite by the common law" (he is speaking of the common law of England) "to the valid celebration of marriage; the consent of the parties is all that is required. If the contract be made *per verba de presenti*, or if made *per verba de futuro* and be followed by consummation, it amounts to a valid marriage, and it is equally binding as if made *in facie ecclesie*. This is the doctrine of the common law, and also of the canon law which governed marriages

in England prior to the Marriage Act; and the canon law is also the general law throughout Europe as to marriages, except where it has been \*altered." He then goes on to point out particular States, such as Maine and Massachusetts, in which particular regulations as to the form of contracting marriage are introduced by statute, but intimates that in the absence of positive statute, the common law of England, as he has expounded it, governs the marriage contract.

REG.  
v.  
MILLIS.  
[ \*778 ]

In Story's treatise "On the Conflict of Laws," he says (c. 5), "The common law of England, like the late law existing in America, considers marriage in no other light than as a civil contract." He goes on to explain, that wherever particular forms are not required by positive statute, a complete marriage is constituted by the consent of the parties. There can be no doubt that this view of the common law of England has been constantly acted upon in every State of the American Union; but we are now told that all parties who have thus contracted the matrimonial tie, have been living together in a state of concubinage.

Now, my Lords, am I not justified in saying that the law upon this subject has long been considered settled by judicial decision? It is possible that some new discovery may have been made, and that all the eminent men whose opinions I have cited may have been in error. But how is this proved? If an express decision against the validity of such a marriage had been dug out from some obscure repository, I should have paid little attention to it against such a current of authority, and I should have treated it as I do the opinion of Mr. Justice BAYLEY, cited at the Bar, that a marriage in Ireland between Dissenters by a dissenting minister was void, because it was celebrated, not in a church, but in a private house. But from the earliest times, with the exception of *\*Foxcroft's* and *Del Heith's* cases, hitherto allowed not to be law, there is no decision discovered to show that a marriage contracted by the parties with the intention of instantly entering into the state of wedlock is void, or is not attended with the incident of marriage of rendering the issue legitimate.

[ \*779 ]

The counsel for the prisoner relied very much upon the general scope of the statutes respecting marriage, as showing that there can be no valid marriage without the intervention of a priest; and there is great reason to think that this notion was entertained by those who framed the Irish statutes making it highly penal for Roman Catholic priests to marry any except Roman Catholics,

REG.  
v.  
MILLIS.

and to annul marriages celebrated by Roman Catholic priests unless both parties were Roman Catholics: although it cannot be said that upon a contrary supposition such statutes would be nugatory; for, whatever the law of the land may be, there are few who would enter into the conjugal state without the nuptial benediction from a priest; and the nullifying enactment would avoid the marriage unlawfully celebrated by a Catholic priest, even if at common law the parties might have contracted a valid marriage without any priest, Catholic or Protestant.

The statutes respecting pre-contracts *per verba de presenti* do not seem to me by any means to show that there may not be *ipsum matrimonium* without the intervention of a priest; for I have already attempted to explain that there may be a contract *per verba de presenti* which is not *ipsum matrimonium*, if the parties consider it executory, and do not mean to live together as man and wife till their marriage shall be subsequently solemnised in the face of the Church. Contracts *per verba de presenti, subsequente copulâ*, \*are exempted from the operation of the Acts, because cohabitation is supposed to be proof that they meant to contract present marriage, and persons who have so contracted are treated as married. But there is another class of statutes, entirely overlooked by the Judges, and which in my mind afford a strong argument against the necessity of the presence of a priest apostolically ordained to the constitution of a valid marriage; I allude to the statutes for removing doubts as to the validity of marriages where no such priest was present. These are declaratory Acts.

[ \*780 ]

By the Irish Act, 21 & 22 Geo. III. c. 25, marriages celebrated by dissenting ministers in Ireland, between members of their own congregations, are declared to be valid. These marriages were obviously, before the passing of the Act, in the same situation exactly as the marriage the validity of which we are now considering. At common law the validity of a marriage could in no degree depend upon the religious profession of the parties. By the Act of the Imperial Parliament, 58 Geo. III. c. 84, marriages solemnised by Presbyterian ministers in the East Indies are declared to be valid; the law of marriage being the same in the East Indies as in Ireland. Further, by the Imperial Act, 4 Geo. IV. c. 91, marriages in a foreign country celebrated by any chaplain, or by any officer or other person appointed by the Commander-in-chief, are declared to be valid. The common law of England with respect to marriage prevails within the lines of

the English army abroad, and here you have a Parliamentary declaration that according to the common law of England, a marriage by a layman was valid. I have always understood that although a statute in form enactive is not necessarily to be taken as introductory of a new law; a \*declaratory law is a positive announcement by the Legislature that the law declared existed before the passing of the statute, and shall have a retrospective operation, and shall guide the decision of other cases similarly circumstanced as the case the law of which is declared. These declaratory statutes were cited at the Bar, but they are not noticed by the Lord Chief Justice TINDAL; and it would have been satisfactory to have known how they were viewed by the Judges who, “after considerable fluctuation and doubt, acceded to the opinion of the majority.”

REG.  
v.  
MILLIS.

[ \*781 ]

There is another Act of Parliament on this subject, which I humbly think is entitled to some consideration. By 32 Geo. III. c. 21 (Irish), Protestant dissenting ministers may publish banns between a Protestant Dissenter and a Roman Catholic, and marry them, but are prohibited from celebrating marriage between a Roman Catholic and a member of the Established Protestant Church; affording an inference that a marriage by a dissenting minister, like a marriage by a Roman Catholic priest, would be valid where not forbidden by the Legislature.

Much reliance has been placed on the statement that actions for breach of promise of marriage have been maintained in Ireland where there had been a *copula* after the promise; and actions for seduction after a promise to marry, the daughter being called as a witness; which it is said would be, upon the doctrine contended for by the Crown, instances of a wife being permitted to sue her husband, and to give evidence against him in a court of justice. But, in countries where the canon law certainly prevails, it does not follow that in every case marriage is necessarily constituted by a *copula* following a promise to marry. To constitute such a marriage there \*must first be mutual promises solemnly and sincerely entered into, and then there must be a *copula* while these promises remain unreleased and in force. Now the mere words indicating an intention to marry, used in the course of soliciting chastity, not understood to be serious, however culpable they may be, cannot be construed into a binding contract to marry; and regard must be had to the circumstances under which the *copula* takes place: for if the woman in surrendering her person is conscious that she is

[ \*782 ]

REG.  
v.  
MILLIS.

committing an act of fornication instead of consummating her marriage, the *copula* cannot be connected with any previous promise that has been made, and marriage is not thereby constituted. In examining all contracts you must look to the intention of the contracting parties, and there can be no binding contract without the parties intending to enter into it. In the cases referred to, it would probably be found that, according to the intention of the parties, the *copula* was not in performance of the promise; and that, if the female gave any credit to the promise, she did not think of then being made a wife, and still treated the promise as executory, to be performed at a future time by a marriage ceremony. It may well be admitted that in Ireland marriage was not usually constituted by such means, for it was not in the contemplation of the parties so to constitute it; but this will by no means show that marriage was not constituted by a ceremony which the parties intended and believed to constitute marriage, and after which they lived together as man and wife.

[ \*783 ]

Then it is said that the Statute of Merton shows that the canon law respecting matrimony was never admitted into England. The Statute of Merton does not relate to the subject we are discussing; it settles \*only who are to be legitimate, and determines that none shall be legitimate who are not born after the marriage of their parents; but it leaves the question of marriage untouched, and there is no inconsistency in supposing that marriage may be contracted according to the rules of the canon law, although the marriage of the parents after the birth of children may not render them legitimate. As a *reductio ad absurdum*, this case is put: "A. made a contract of marriage *per verba de presenti* with B., and then in the lifetime of B. marries C. *in facie ecclesiæ*, and has children at the same time both by C. and B.: B. dies. Are the issues of both legitimate?" I have no difficulty in answering this question. If A. and B. by their contract meant to enter into instant marriage, and to live together as man and wife without waiting for any other ceremony, the issue of B. are legitimate, and the issue of C. are bastards. On the other hand, if A. and B., though using words *de presenti*, did not mean to become complete man and wife till a subsequent ceremony should be performed, and they afterwards came together without thereby meaning to consummate a marriage, a possible though not a probable supposition, their engagement resting merely in contract, and B. dying before a marriage was solemnised, the issue of C. would be legitimate: but no case is to

be found in the books in which issue of parties who have contracted *per verba de presenti* have been held illegitimate ; indeed, in almost all those cases, I believe it will be found that the parties never came together, and never meant to come together as man and wife, so that issue never appeared. It is easy to conceive that parties might contract *per verba de presenti*, without meaning instantly to become man and wife. Such an engagement \*was irrevocable ; but there might well be an irrevocable engagement, although it was at the same time only executory. The distinction I have taken solves with equal facility the case put, “suppose two sons born at the same time, one from each mother, which is the eldest son and heir ? ”

REG.  
C.  
MILLIS.

[ \*784 ]

But these difficulties are trifling compared with the difficulties to be encountered on the supposition that, by the common law, marriage could not be possibly constituted without the intervention of a priest episcopally ordained. What if the person who officiates as a priest, and is believed by the parties to be so, is no priest, and has never received orders of any kind ? This question was suggested during the argument, but is not met by the Judges. *Mr. Pemberton* admitted at the Bar, as according to the authorities he was bound to do, that the marriage would be valid. Lord STOWELL repeatedly expressed an opinion to this effect ; and it turns out that in the instance of a *pseudo* parson, who about 20 years ago officiated as curate of St. Martin's-in-the-Fields, and during that time married many couples, upon the discovery of his being an impostor, which became a matter of great notoriety, no Act of Parliament passed to give validity to the marriages which he had solemnised ; which could only have arisen from the Government of the day being convinced, after the best advice, that in themselves they were valid.

Indeed, that parties who have vowed eternal fidelity at the altar, and having gone through all the forms which the Church and the State prescribe, have received the nuptial benediction from one whom they have every reason to believe was commissioned to pronounce it by a successor of the holy Apostles, should run the risk of finding that some years after, \*from the rector of the parish being imposed upon by a layman pretending to be a priest duly ordained, they are living in a state of concubinage and that their children are bastards,—is a supposition so monstrous that no one has ventured to lay down for law a doctrine which would lead to such consequences. But what becomes of the doctrine of the necessity of a priest in

[ \*785 ]



REG.  
F.  
MILLIS.

Apostolical orders, to the validity of marriage? The proposition must now be changed, that there must be present one believed by the parties to be a priest in Apostolical orders; and a marriage by a layman may be good. There is a good marriage by a layman from the mistake of the parties, who thought that he was a priest with power to marry them. Does it not seem strange that at the same time a marriage should be void celebrated by a clergyman who is actually in Presbyterian orders, having been solemnly ordained by the imposition of hands according to the rites of his Church, and who is believed by the parties to have sufficient authority by the law of God and man to join them in wedlock?

Here I must observe how little weight is to be given to what was gravely relied upon at the Bar, the prevailing belief among mankind of the necessity of the presence of a priest at a valid marriage, as evinced by novelists and dramatists: for it will be found that these expounders of the law always make a marriage by a sham parson void, contrary to the opinion of Lord STOWELL and the canonists; and they give validity to marriages in masquerade, where the parties were entirely mistaken as to the persons with whom they are united; marriages which would hardly be supported in the Ecclesiastical Court, in a suit of jactitation, or for restitution of conjugal rights.

[ \*786 ]

There is another case, not met by the learned \*Judges, which essentially breaks in upon the rule they have laid down. It has been repeatedly held, and there can be no doubt that such is the law, that in circumstances where it is utterly impossible to procure the presence of a priest, there may be a valid marriage by the consent of the parties. Lord STOWELL has referred to the marriage between the first parents of mankind; and looking to a more modern case, which would be determined by the common law of England, I presume the learned Judges would not doubt, that in the recent settlement of Pitcairn's Island, the descendants of the mutineers of the *Bounty* might lawfully have contracted marriage before they had been visited by a clergyman in episcopal orders. The necessity for the presence of such a clergyman, must be qualified with the condition that his attendance may by possibility be procured. Again, the rule that marriage is void unless celebrated *per presbyterum sacris ordinibus constitutum*, is broken in upon by the admission that a marriage is valid if celebrated by a deacon, who is no more a presbyter than the parish clerk. A deacon is in orders, but not in priest's orders; and if the test of marriage be the question usually

put by the temporal Courts to the Bishop, on the plea of *ne unques accouplés in loyal matrimonie*, where the marriage was celebrated by a deacon, the answer must have been in the negative; so that the widow would have lost her dower; and upon a writ of right by the son as heir, there must have been judgment against him on the ground that he was a bastard.

R&G.  
c.  
MILLIS.

The Judges seem to intimate that a marriage by a deacon before the Reformation would have been bad, but that since the Reformation it is valid. I should like to know by what authority the change has been \*brought about; Lord Hardwicke's Act is silent upon the subject, and Parliament has in no shape interfered. Has the Church authority to make such a change, with or without the consent of the Crown; and might it now be ordained by the Convocation that marriage may not be celebrated by a deacon, or that it may be celebrated by a parish clerk or a churchwarden? May the law of England, respecting a contract on which such important civil rights depend, be altered without the authority of Parliament? But if such a power does belong to the Church, where is the canon by which it was exercised? All the canons passed since the time of Henry VIII. are extant, as much as the Acts of Parliament, and no one is to be found alluding to such a subject. In the Book of Common Prayer it is said that a deacon may baptise in the absence of the priest; it is silent as to his authority to marry, which seems always to have been considered one of his ordinary functions.

[ \*787 ]

But I will now show that at common law there might have been a valid marriage by one not even in deacon's orders, and where no one was deceived, where there was no mistake by the parties. Till the 13 & 14 Car. II. c. 4, s. 14, there was no necessity for the clerk presented by the patron to a living being in orders of any sort, and he had a certain time after his admission to be ordained. There is an important case upon this point, not hitherto cited; *Costard v. Windet* (1). One who was a mere doctor of the civil law, and never any spiritual person, was admitted to a benefice. Not having taken orders, he was afterwards deprived by a sentence declaratory *quia mere laicus*. A question arose whether a lease \*granted by him after his admission was valid. GAWDY, Justice, was at first of opinion that the lease was void, because upon the matter he was never incumbent; but POPHAM and FENNER *contra*, "for it would be mischievous if all the Acts by such averments should be drawn in question. And every one agreed that all

[ \*788 ]

REG.  
v.  
MILLIS.

spiritual acts, as marriages, &c., by such an one, during the time that he is parson, are good ;” and so, with the assent of GAWDY, they resolved to adjudge it.

I must likewise observe that there might have been great difficulty in determining what kind of priest is a good priest to celebrate a marriage ; the test being, not whether he be a clergyman of the Established Church, but whether he has been ordained by a Bishop. Is a priest of the Greek Church sufficient ? or of the Christian Church of Abyssinia ? or of the Lutheran Church, which maintains episcopacy in Denmark and Sweden, while in other countries it is governed by a consistory of ecclesiastics, by whom orders are conferred ? Upon a question of the validity of a marriage by a priest of a foreign Church, by whom and on what principle, between the time of the Reformation and the passing of Lord Hardwicke’s Act, would the sufficiency of his orders have been tried ? Before the Reformation there would have been no difficulty, for the only orders recognised would have been those of the Church of Rome ; but that test cannot now be applied, as a priest ordained by an English Protestant Bishop would not be competent, for there is no reciprocity between the Church of Rome and the Church of England on this subject ; as English episcopalian orders are not recognised by the Church of Rome, and a clergyman of the Church of England conforming to the Church of Rome must be re-ordained by a Roman \*Catholic Bishop. Although now no orders are recognised by the Church of England except those conferred by a Bishop, there seems for some time after the Reformation to have been considerable laxity upon this subject. It would appear that clergymen ordained by foreign Churches which had laid aside episcopacy, were admitted into English benefices without being re-ordained. Dr. Whittingham, who had been ordained by the Swiss clergy, and never by a Bishop, was appointed Dean of Durham, and held the office many years, till he died. Archbishop Grindall, in 1582, issued a licence to Mr. John Morrison, stating that as he had been ordained to sacred orders and the holy ministry five years before, in the kingdom of Scotland, by the imposition of hands, according to the laudable forms and rites of the reformed Church of Scotland, “ We, therefore, as much as in us lies and as by right we may, approving and ratifying the form of your ordination as aforesaid, grant unto you a licence and faculty that in such orders by you taken, you may have power, throughout the whole province of Canterbury, to celebrate divine offices, to

[ \*789 ]

minister the sacraments," &c. Would a marriage celebrated by Dr. Whittingham or by Mr. Morrison, in the reign of Elizabeth, have been held void?

REG.  
v.  
MILLIS.

It is remarkable that in the Act of Uniformity (section 15), there is a provision "that the penalties in this Act shall not extend to the foreigners or aliens of the foreign reformed Churches, allowed or to be allowed by the King's Majesty, his heirs, or successors, in England." Suppose that Charles II. had allowed, as he might have done, clergymen of the Church of Geneva to officiate in England, would marriages by them have been void because they had not been episcopally ordained? Such clergymen could \*not have been recognised as priests when the common law took its origin; nor any clergy not allowed by the Pope.

[ \*790 ]

The question again arises, by what authority a new class of persons, viz. Protestant clergymen, disclaimed by the Pope, are permitted to celebrate a valid marriage, who could not have done so at the common law, and there having been no statute to alter the law upon the subject? Is not the solution of the difficulty this, that at the common law the interposition of a priest was not necessary to the validity of the marriage for civil purposes, although the Church, treating marriage as a sacrament, from time to time varied the forms which it declared necessary to constitute a regular marriage such as the Church would entirely approve?

I now come to a difficulty met, I confess, boldly by the Judges; the consideration of the marriages of Quakers, which we are now told are all invalid, because not contracted before a priest episcopally ordained. I admit that this consequence follows inevitably from the doctrine contended for, and that the validity of these marriages is a complete test of that doctrine. They are left by Lord Hardwicke's Act as they were at common law; and they cannot be good at common law, if the presence of a priest episcopally ordained was necessary to the validity of marriage. I must observe, with great deference to my noble and learned friend (1), that it never has been thought till to-day that that Act gave any validity to Quakers' marriages, which Quakers' marriages had not at common law; for it merely excepts those marriages from the operation of the Act, and leaves them as it found them. I will by-and-by cite the clause; it treats them exactly like marriages in Scotland.

(1) Lord Abinger, who had left the House.

REG.  
v.  
MILLIS.  
[ 791 ]

THE LORD CHANCELLOR :

What I understood the noble and learned Lord to state was to adopt in substance the statement of the CHIEF JUSTICE, who says, "Since the passing of the Marriage Act it has generally been supposed that the exception contained therein as to the marriages of Quakers and Jews, amounted to a tacit acknowledgment by the Legislature, that a marriage solemnised with the religious ceremonies which they were respectively known to adopt, ought to be considered sufficient; but before the passing of that Act, when the question was left perfectly open, we find no case in which it has been held that a marriage between Quakers was a legal marriage on the ground that it was a marriage by a contract *per verba de presenti*, but, on the contrary, the inference is strong that they were never considered legal."

LORD CAMPBELL :

That is exactly as I view it; that it is a tacit acknowledgment that the marriages were valid.

THE LORD CHANCELLOR :

I do not think that my noble and learned friend meant to say more than merely to adopt that statement. If he were present I should leave him to speak for himself, but that is the way I understood it.

LORD CAMPBELL :

He seemed to draw a line of distinction between Quaker marriages before Lord Hardwicke's Marriage Act, and since.

LORD BROUGHAM :

So I understood it.

LORD CAMPBELL :

[ \*792 ]

But is not the 18th section of 26 Geo. II. c. 33, a legislative declaration that such marriages, if contracted so that the parties intended they should constitute the relation of husband and wife, were valid before the Act passed, and should \*continue valid? The words are, "That nothing in this Act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such

marriage shall be of the people called Quakers, or persons professing the Jewish religion, respectively, nor to any marriage solemnised beyond the seas." Marriages were valid in Scotland before the passing of the Act without the intervention of a priest in orders, and so they were to continue.

REG.  
MILLIS.

The sect of Quakers had existed in England for 150 years before the Marriage Act passed. They did not recognise any order of priesthood, and they had contracted marriage by a ceremony which took place only among members of their own persuasion. They would have considered it sinful to be married in a church, or to have been united by a clergyman. They would have submitted to any penalty or punishment, rather than submit to the ceremony of marriage prescribed by the Church of England. They could not be brought under the operation of the new Act. What was the intention of the Legislature respecting their past and future condition? Was it meant that they should be considered as then all living in concubinage, their children being all illegitimate; and that they should be incapable of entering into lawful wedlock in all time to come? If there had been then any grave doubt as to the validity of their marriages entered into according to their own forms, would there not have been an enactment giving validity to such marriages? As to the taking of oaths in Courts of Justice, a matter of much less consequence, relief had long before been afforded to them. The statute 6 & 7 Will. III. c. 6, when properly examined, I think \*furnishes strong evidence to show that these were legal marriages. The Act is "for granting to his Majesty certain rates and duties upon marriages, births, and burials." Quakers marrying are expressly subjected to the duty. In one place the marriage between them is called a pretended marriage; but by this uncivil expression was it intended to declare that the marriage was void, and to levy a tax upon concubinage? On the contrary, it is declared that "any such marriage or pretended marriage shall be of the same force and nature as if the Act had not been made." The tax is imposed on any other persons who should cohabit and live together as man and wife; affording a strong evidence that marriage was then constituted by cohabitation and living together as man and wife.

[ \*793 ]

In 1661, a marriage between Quakers according to their own ceremonies, was held valid at Nisi Prius in an action of ejectment, and the ruling appears to have been acquiesced in (1). The casual

(1) 1 Hagg. Cons. Rep. App. 9.

REG.  
v.  
MILLIS.

doubt imputed to Lord HALE, when he directed a case to be made as to the validity of a Quaker marriage, can be entitled to no weight.

[ \*794 ]

Since the Marriage Act in 1753, down to the present day, Quakers, many of them men not only of great wealth but highly educated, not only distinguished for literature and science, but eminent lawyers, and ladies, not only of the strictest virtue and the most refined delicacy, but of the most brilliant talents and accomplishments, have contracted marriage according to the forms of their religion, without the most distant suspicion that in doing so they were violating the law of God or of man. I confess I should like to know whether all the Judges who have concurred in the opinion that a marriage is void by the common \*law if not celebrated in the presence of a priest in episcopal orders, are of opinion that all Quakers, male and female, cohabiting as man and wife, are living in a state of concubinage, and that all the children of all Quakers are illegitimate?

Till this controversy began by a note of the editor of a new edition of an obscure law book, I believe that the validity of the marriage of Quakers had not been questioned. Quakers have maintained actions for criminal conversation, where direct proof of a valid marriage is to be given: *Deane v. Thomas* (1), *Harford v. Morris* (2). Widowers and widows, being Quakers, and the children of Quakers, have received administration in the Ecclesiastical Courts; and in cases of intestacy, have succeeded to personal property according to the Statute of Distributions. In tracing a title to real property, no objection has ever been made on the ground that it had been in a Quaker family, and no doubt has existed that the eldest son of a Quaker marriage would take by descent lands of which his father died seised in fee simple. I cannot help thinking that such a general understanding and such a long course of acting greatly outweigh any nice scruples that may now be raised upon the subject.

[ \*795 ]

Most of these observations apply, if possible, with greater strength respecting the marriages of Jews. It was utterly impossible that Jews ever could have been married by the intervention of a Christian priest. In every country where they have inhabited, they have been allowed to marry according to their own rites and ceremonies, and marriages so contracted have been held valid. Jews were banished from this \*country from the time of Edw. I.

(1) 31 R. R. 738 (Moo. & M. 361).

(2) 1 Hagg. Cons. Rep. App. 9.

REG.  
v.  
MILLIS.

till the time of Oliver Cromwell ; but then they were permitted to settle, and they did settle, in England in considerable numbers. They have married here according to their own rites and ceremonies, and their marriages so contracted have undoubtedly been considered valid. Did the Marriage Act mean again to banish them from England, or to prevent them from entering into the married state ? It is said they were considered as foreigners. There can be no doubt that when born in England, they are in all respects British subjects. But suppose they were aliens : aliens can only contract marriage in England according to the law of England ; and if by that law the presence of a priest episcopally ordained were necessary to the due constitution of marriage, without the presence of such a priest marriage could not be lawfully constituted between any aliens in England. Therefore, the moment it is allowed that in England a marriage contracted by Jews according to their own rites and ceremonies is valid, the doctrine is gone that by the common law the presence of a priest episcopally ordained was necessary to the due constitution of marriage. Although the LORD CHIEF JUSTICE intimates his opinion that Quaker marriages are void, he does not say the same of the marriages of Jews ; and I think it is impossible that he should, after the express decisions on the subject.

There is the case of *Andreas v. Andreas*, in the Consistory Court in 1737, before Dr. Henchman. That was a suit by a wife against her husband, for the restitution of conjugal rights. The parties were both Jews, and the libel alleged that they were married according to the forms of the Jewish nation. Objection was made that as they had not been married by a \*priest in orders, the marriage was void, and the Court could take no notice of it. The Court was of opinion, however, that as the parties had contracted such a marriage as would bind them according to the Jewish forms, the woman was entitled to a remedy, and that the proceeding would well lie, and admitted the libel. Again, in the case of *Vigevna v. Alvarez* (1), in the Prerogative Court in 1794, before Sir William Wynne ; the libel pleaded a marriage between Jews, according to the rites and ceremonies of the Jewish religion. It was objected that the libel was bad upon the face of it, and ought to be rejected ; for that persons coming before the Ecclesiastical Court to claim any right by marriage, must show the marriage to have been according to the rites and ceremonies of the Church Christian : for which *Haydon v. Gould* was cited. Sir W. WYNNE said, that if a

[ \*796 ]

(1) 1 Hagg. Cons. Rep. App. 7.



Rsg.  
v.  
MILLIS.

[ \*797 ]

Jew were called upon to prove his marriage, the mode of proof must have been conformable to the Jewish rites; particularly since the Marriage Act, which lays down the law of this country as to marriages, with an exception for Jews and Quakers. That is a solemn adjudication upon the validity of such marriages. Here the allegation being that the parties were married according to the rites of the Jewish Church, the Court thought that the libel ought to be admitted; as if the allegation was proved, a valid marriage was constituted. In *Lindo v. Belisario* (1), which first came before Sir W. Scott in the Consistory Court of London, and then before Sir W. Wynne in the Court of Arches, a Jewish marriage was set aside because the ceremonies prescribed by the Jewish law had not been duly observed, although words amounting to a contract *per verba de presenti* \*had passed between the parties; but if those ceremonies had been duly observed, the marriage would unquestionably have been held valid, although no Christian priest was present at it. *Lindo v. Belisario* was cited to show that even among the Jews, mere *verba de presenti* will not make marriage without the religious ceremony. This only illustrates what I have tried to explain, that the contract *per verba de presenti* only constitutes marriage when the parties intend that it should do so without any subsequent ceremony; but that when a subsequent ceremony is necessary to the completion of the marriage, the *verba de presenti* only operate as an executory contract.

I ought to observe that the language of the Legislature in 6 & 7 Will. IV. c. 85, s. 2, regulating the marriage of Quakers and Jews in future, is, in my opinion, very strong to show that their past marriages were valid: "That the Society of Friends, commonly called Quakers, and also persons professing the Jewish religion, may continue to contract and solemnise marriages, according to the usages of the said society and of the said persons respectively, and every such marriage is hereby declared and confirmed good in law," &c. "provided that notice to the registrar shall have been given," &c. A new condition is imposed, and that being observed, the parties continuing to contract and solemnise marriage as before, every such marriage is declared and confirmed good in law. It comes to this, then, that marriages of Jews and Quakers, excepted from Lord Hardwicke's Act, are valid at common law, and prove that at common law there might be a marriage without the intervention of a priest in episcopal orders.

(1) *Id.* 216, and App. 7.

In some parts of the LORD CHIEF JUSTICE's opinion he intimates that the condition required for the validity \*of a marriage is only that there should be a religious ceremony performed on the occasion. However becoming and desirable it may be that a relation of such deep importance should be contracted in the manner the most solemn and impressive, and that the blessing of Heaven should be invoked on those entering into it, I cannot find that any religious ceremony has been considered necessary to its validity. But supposing the sound doctrine to be that some religious ceremony upon the occasion is indispensable, I think it would deserve great consideration whether the religious ceremony which the parties consider the most sacred should not be deemed sufficient. Before the Reformation, when there was a religious ceremony, it was celebrated by a priest recognised as in orders by the Church of Rome. Since the Reformation, among members of the Church of England, it has been celebrated by a priest whom the Church of Rome would consider a mere layman. Among Protestant Dissenters in England down to the Marriage Act, and in Ireland down to the present time, the religious ceremony has been celebrated by a priest, not episcopally ordained, but ordained by the imposition of the hands of those who had been themselves so ordained, and whom they consider duly commissioned to preach the Gospel of Jesus Christ, and to administer the sacraments of His holy religion; although by the Church of England he is considered only as a layman. The question is, whether this priest might not as effectually perform the religious ceremony required by the common law, as the priest who would have been regarded as a layman by the Church which was dominant when the common law took its origin, and for many centuries after.

REG.  
v.  
MILLIS.  
[ \*798 ]

For these reasons, my Lords, I have arrived at \*the clear conclusion that the marriage between the prisoner and Hester Graham was a valid marriage. Had I regarded the question as originally more doubtful, I should have thought it right to adhere to decisions by which the law has been considered settled for half a century. On questions of property it has often been said that it is the duty of a Judge to support decisions which have been some time acquiesced in, and which have been acted upon, even if he would not have concurred in them when they were pronounced; lest titles should be shaken. Does not this rule apply with infinitely greater force to questions of status, and most of all to questions respecting marriage, on which the happiness of individuals

[ \*799 ]

REG.  
v.  
MILLIS.

and the welfare of society so essentially depend? Consider the consequences of now holding that by the common law a valid marriage cannot be contracted without the presence of a priest episcopally ordained. I do not suppose that as yet it is intended to impeach marriages in Scotland on this ground, but hundreds of thousands of marriages which have taken place in Ireland since the time of James I., and the validity of which had never been doubted, are now asserted to have been null. In England, the marriages of all Quakers and Jews, and of all persons who before the Marriage Act may have been married by Presbyterian or other dissenting ministers, are also asserted to have been null. And do not let it be supposed that the evil is confined to the members of those sects, with whom there might be less sympathy; but the members of the Established Church may be deprived of most valuable rights of property by the invalidity of such marriages.

[ \*800 ] When we consider our extensive colonies in every quarter of the globe, where the common law of \*England respecting marriage prevails, the confusion and dismay will be still greater. Vast numbers of marriages have been celebrated in the East Indies and elsewhere by Presbyterian and Missionary ministers of various persuasions, under circumstances in which no validating statute would apply to them: and where the attendance of a minister of religion could not be procured, many marriages have taken place without any scruple of the parties, or their parents or relatives, before consuls, military officers, magistrates, and captains of ships. As to the past, we may resort to the clumsy expedient of *ex post facto* legislation, and enact that all those marriages shall be as valid and effectual as if they had been celebrated by a priest in episcopal orders; but what are you to do for the future? The common law in its wisdom accommodates itself with respect to marriage to the varying circumstances in which the parties may be placed. By statute you must have rigid rules, to be strictly complied with. Such rules have been wisely framed by the last Marriage Act for England, which proceeds on the principle that marriage is a civil contract to be accompanied by a religious ceremony, unless the parties are so absurd and perverted in their understandings that they object to a religious ceremony; in which case (which I rejoice to think has been very rare) the religious ceremony has been dispensed with. But the framing of a similar Act for Ireland, which shall give satisfaction to the Established Church, to the Roman Catholic priesthood and population, and

to the Presbyterians and other Protestant Dissenters, with the necessary machinery for notice, licence, and registration, I am afraid will be found a task very difficult for any Government to accomplish. Then what \*prospective provisions are to be made for marriages between British subjects in the colonies, in Pagan countries, and on the wide ocean? May you not be driven to enact that the ancient canon law, which Lord STOWELL, as it is now said, erroneously supposed to have been the common law of England, shall be taken to be the law of England wherever it has not been altered by positive statutes; and thus reduce things to the quiet and satisfactory state in which they were before this controversy arose?

REG.  
MILLS.

[ \*801 ]

But a wiser and more salutary course will be for your Lordships judicially to decide that, according to the opinion of Lord STOWELL, the marriage is valid, and all legislation on the subject may be unnecessary. No one can feel more strongly than I do the embarrassment of coming to such a decision against the unanimous opinion of the English Judges whom you have consulted; but it is my duty to remind your Lordships, that, paying all due deference to that opinion, you are not bound by it. By the constitution of the country, judgment is to be given on this writ of error by your Lordships; you consult the Judges only to assist you in coming to a right judgment, and you are to be governed by their opinion only in as far as you are persuaded by the reasons on which it is founded. Your Lordships have repeatedly reversed unanimous decisions of the fifteen Judges of Scotland, on points of Scottish law; and I myself have several times heard Lord ELDON quote with approbation a saying, that a decision of the majority, where there was a difference of opinion on the Bench, with the reasons of all the Judges on both sides of the question, was more to be regarded than the unanimous decision of the whole, pronounced by a single Judge; which raised in his mind a suspicion \*that some might have compromised their opinion, who might have doubted, and who, had they reduced their thoughts into writing, not only might have confirmed themselves in the views originally taken by them, but might have brought over the majority. The unanimous opinion of the English Judges on questions of English law, has likewise several times been overruled by this House. If I am to be governed by the authority of great names, I must say, with all respect for the distinguished magistrates now adorning the Bench, I cannot place them higher than their predecessors, Lord HOLT, Mr. Justice

[ \*802 ]

REG.  
v.  
MILLIS.

GOULD, Mr. Justice POWIS, Mr. Justice POWELL, Lord KENYON, Lord ELLENBOROUGH, Lord Chief Justice GIBBS, Lord WYNFORD, Lord TENTERDEN, and Lord STOWELL.

It is a great consolation to me to find that the name of my noble and learned friend the present CHIEF JUSTICE OF ENGLAND, is to be added to this illustrious list.

Lord BROUGHAM stated that Lord DENMAN concurred with Lord CAMPBELL and himself on this subject; but hoped that the noble and learned Lord, who was then on circuit, would be able to attend to give his reasons in person.

LORD CAMPBELL :

Your Lordships should likewise bear in mind, that two of the common-law Judges, Mr. Justice COLTMAN and Mr. Justice WIGHTMAN, have not expressed any opinion upon the question; and that the two Judges of the Ecclesiastical Courts, who are Privy Councillors and might have been summoned by your Lordships (who would have been peculiarly well qualified to assist you on such a question), might have adhered to the doctrine upon marriage, which has uniformly prevailed in Doctors' Commons from the most remote times to the present hour.

[ 803 ]

Supposing the first marriage to be valid, that the prisoner was "married" within the meaning of 10 Geo. IV. c. 34, and so guilty of bigamy by marrying again, I cannot doubt for one moment; and my opinion would have been the same if the second marriage had been exactly in the same form as the first, instead of being in a church according to the rites and ceremonies of the Church of England. How can this be considered a mere executory contract not intended to operate as marriage till publicly solemnised, when the parties were actually married by a minister of religion, who they believed had power to marry them, and after receiving the nuptial benediction from him, lived together as husband and wife?

I must therefore very humbly advise your Lordships to reverse the judgment of the Court of Queen's Bench in *Ireland*, and to give judgment for the Crown.

THE LORD CHANCELLOR :

The course I should propose to your Lordships is, to postpone the further consideration of this case. With respect to the proposition which has been made by my noble and learned friend (1)

(1) Lord Brougham, *ante*, p. 191.

for calling in the assistance of the Judges of the Ecclesiastical Court, I doubt very much whether it would be consistent with the forms of this House. I presume that the suggestion is founded upon what is stated by the LORD CHIEF JUSTICE in his judgment, that as far as related to the ecclesiastical part of the question, the learned Judges had not been able to give that attention to the subject which they were desirous of giving, and which they would have given under other circumstances. I am afraid that the utmost that could be done, would be to hear \*civilians at the Bar. I doubt whether we can take the advice of civilians. From what the learned CHIEF JUSTICE says, speaking of the ecclesiastical law (1), it is quite obvious that the Judges feel that they had not had sufficient time to consider, with the attention and care they would have desired to give, this very important part of the subject.

REG.  
C.  
MILLIS.

[ \*804 ]

LORD BROUGHAM :

I am quite aware of the difficulty to which my noble and learned friend refers. My suggestion was grounded upon the ancient practice of this House having the attendance of Privy Councillors. It is not as Judges of the Ecclesiastical Court that I proposed their assistance being obtained, but as Privy Councillors, which the learned Judges of that Court always are ; but it requires a further consideration, and I only throw it out as a suggestion.

LORD CAMPBELL :

In Mr. Macqueen's book it is stated (2) that Privy Councillors used to attend to assist the House in judicial matters ; and I apprehend that the Judges of the Ecclesiastical Courts, who are Privy Councillors, would have been able in this case to render your Lordships valuable assistance. But, however, this may be made the subject of future consideration. I shall not oppose further argument, although I am now prepared to decide the first marriage to be valid, and to give judgment for the Crown.

The further consideration of the cause was postponed.

LORD DENMAN :

In approaching this great subject, I wish, in the first place, to declare my entire concurrence \*with those who think that this Court of Error ought to give a judgment upon the question which is

1843.  
Aug. 11.

[ \*805 ]

(1) *Aule*, pp. 137, 153, 154.

(2) Page 671 *et seq.*

REG.  
v.  
MILLIS.

brought before them. Whatever the law is, I think it ought to be ascertained and declared. The consequences are of immense importance to individuals, inasmuch as the present decision acquits the prisoner of bigamy, by assuming that she with whom he first contracted marriage is not his wife, but his concubine, and all their children illegitimate. In prosecutions of this nature both marriages are under discussion; and it is often no more desirable for the first wife to prove that she holds that relation, and enjoys the rights which flow from it, than it is for the second wife to be released from the tie into which she has been entrapped. But this judgment annuls the first contract, to the disgrace and prejudice of the female, and fixes the second, to the end of life, upon one who might probably be happy to escape from it.

The more general consequences of this decision are important to an extent which cannot be calculated. It will affect all marriages contracted by British subjects in foreign countries where no municipal laws prevail, on the high seas, and many in our own colonies, as well as the discussion of all marriages which may have been contracted in this country before the Marriage Act. Probably some of these may yet become the subject of controversy in the Courts of Law; and all, in my opinion, ought to be decided by the law as it now stands; not disposed of by some sweeping legislative enactment, varying the legal rights and permanent interests of thousands who cannot be heard in their own behalf.

[ \*806 ]

After what has taken place in this cause, the subject itself must be confessed to be full of difficulty; a difficulty greatly increased by the respect and admiration \*which we have habitually felt for the learning and attainments of the Irish Judges. Yet I cannot claim the praise of courage in scrutinising what they have laid down, for to decline that task would be to abdicate the functions of a court of error. The single duty of such a Court is, to enter freely into the examination of what it is called to review, with reference only to the correctness of the reasoning and the validity of the judgment, admitting no other influence from the authority of the former tribunal than the necessity of canvassing all its proceedings with caution, deference, and distrust of ourselves, when we may discover grounds for dissent. This course I have pursued: I carefully studied as well the arguments in the Court of Queen's Bench in Dublin, as the judgments which were pronounced upon them; I heard the able discussion at the Bar of this House, and have since attentively read the notes of it, and I came to my

conclusion with no other hesitation in my own mind than what was produced by the feelings to which I have alluded; and I am now compelled to declare my conviction that the opinion delivered by the majority of those able Judges is not conformable to the law of England.

REG.  
F.  
MILLIS.

The great mistake (if I may so express myself without offence) which appears to me to have been committed is, that of reversing the order of proof. The burden has been supposed to lie upon those who assert that a marriage may be lawful without the intervention of a priest. Now, I most confidently maintain that marriage, being a civil contract flowing from the natural law, must be taken as lawful till some enactment which annuls it can be produced and proved by those who deny its lawfulness. This mistake (as I think) pervades, in a still more striking \*manner, the opinions of those learned Judges who have been consulted by your Lordships. The contract is lawful in its nature; its language is plain; it is entered into by parties competent to contract; surely, then, it must bind those parties to the extent of the stipulation, unless there is some enactment that it shall not bind them. I can see no difference in this respect between marriage and any other lawful contract. Surely it behoves those who say there is such an enactment to point it out distinctly, and to show where it exists; and if it does not exist in specie, then to give the clearest proof, by conclusive reasoning on collateral circumstances, that it has been acted upon as a law. All will admit that marriage *de facto* may be vitiated by non-compliance with such a law, and that possibly the law may be traced in the history of society, though nowhere to be found in words and sentences. It may be inferred from decisions and authorities, and from the text writers on the subject. We only require that it should be so inferred by the deduction of clear reason.

[ \*807 ]

We must next inquire what is the proposition to be proved? Not merely (as I submit) that the Church has desired and directed that such and such solemnities shall attend the contract of marriage, but that the want of them is fatal to the contract. It is not enough that there should be strong requirements that the forms must be observed, strong censures upon the impropriety and irregularity of informal marriages, but there must be declarations of their illegality. Illegal in one sense they must be admitted to be, if they depart from the circumstances which the law prescribes. But the question is on the substance, not on the details. These may be



REG.  
v.  
MILLIS.  
[ \*808 ]

wrong, as not entirely conformable with the law; and yet the law may give full \*effect to the contract as to the civil rights and status of the parties. Therefore, I look not to exhortations, denunciations, reproachful names cast on certain marriages and married persons by men of the Church, but I look for some authority promulgating the consequences that are said to attach to a marriage not solemnised as the Church prescribes. I cannot affirm that it is in point of fact void, till I clearly discern the law which avoids it.

The first document referred to is as early as the second century, the letter of Pope Evaristus to the Bishops of Africa, as showing what was the law of the Church upon that subject. He denounces, he exhorts, he condemns. He says all these marriages are *stupra*, *adulteria*, *contubernia*. He deprecates them in the most earnest language, and urges the faithful by every consideration to abstain from them; but, with all his vehement desire to dissuade from secret marriages, he never once employs that argument which, if just, would have supplied the most powerful motive against contracting them. He neither affects to annul them by his own authority, nor refers to the law as doing so already. He utters a passionate remonstrance, but never threatens the offending parties with the nullity of their clandestine contract. Could he have overlooked a nullifying law, if such had been in force? But, my Lords, I go further still: I say that the very evil condemned is, that marriages so contracted were binding; however irregular and sinful in their manner, they, being once made, were lawful.

[ \*809 ]

A Constitution of Archbishop Lanfranc, in the year 1076, has been quoted in the course of the argument, for the same purpose as this letter of Pope Evaristus. It was little touched upon in the Court of Queen's Bench in Ireland; but *Mr. Pemberton* \*brought forward a translation, which I think rather a free one, approaching nearer to the consequence of nullity than the original words; which might, possibly, be properly construed to pronounce such a marriage sinful, but not declare it void. But supposing Lanfranc to have issued a Constitution in the eleventh century for annulling all marriages not contracted in the presence of a priest, did that become, and did it continue, the law of England, in the face of those decretals of Pope Gregory mentioned yesterday in the argument of my noble and learned friend? Could it be the law in force at the time when the Synod of Exeter, in 1270, condemned a secret first marriage, because persons ignorant of it may be entrapped into a second marriage, which would be void by reason of the first? The

first marriage is there stated to be objectionable only because it was clandestine, and so might lead to impose the consequences of concubinage and illegitimacy upon the wife and offspring of a second marriage.

REG.  
v.  
MILLIS.

Again, in the fifteenth century Archbishop Bouchier inveighs against the same evil. He requires solemnity and publicity in marriages, to save innocent and unsuspecting persons from contracting them with those already made man and wife by a clandestine union. The purport is, let certain forms attend the marriage, and ensure the registration of it, so that its existence may be notorious to all. Applying his enactment to the facts of the present case, he would condemn the prisoner for not marrying his first wife in the face of the Church, because he was thereby enabled to induce the second wife to yield to his embraces; but still more for solemnising the second marriage, which, in spite of its solemnity, he considered void, because it came too late after a marriage \*which, however irregular, created the conjugal relation between the parties. If Lanfranc's Constitution had been the law, it is impossible that either of those decrees should have appeared in the thirteenth and the fifteenth centuries. They demonstrate to my mind, that in point of fact the Church held the marriage good which was complete as a marriage contract, though not celebrated by a priest.

[ \*810 ]

If the law of the Church was thus deficient, the municipal laws referred to as the laws of King Edmund are equally so. They also prescribe what shall be done, though most imperfectly; they require the presence at the ceremony of a mass-priest; a description not very intelligible, but explained as meaning a priest in holy orders, *presbyterum sacris ordinibus constitutum*. This priest is not required to take any part in the proceedings. This is quite consistent with the supposition that the want of notoriety was the evil to be remedied, and that the remedy would be found in the presence of the most respectable neighbour to attest it, and of one belonging to the only lettered class by whom it might be recorded, but hard to reconcile with the notion that a religious rite was essential to the validity of the contract.

If such was the case by the prevailing law of the land at any period, how has it been changed? That it has not operation now, is admitted on all hands; for though the language of pleading requires *presbyterum sacris ordinibus constitutum*, the competency of a deacon to perform the ceremony is now universally acknowledged;

REG.  
 C.  
 MILLIS.

[ \*811 ]

yet a deacon is no more a priest than is the teacher of any dissenting congregation. The same remark applies to marriages celebrated by some impostor officiating as a clergyman without any right to that character; these have been frequently declared \*valid and binding. There is no middle class between priest and no priest; every one must be the one or the other. We are therefore fully warranted in maintaining that if at any time the law required the presence of a priest, that law in early times was abrogated or became obsolete: but it seems to me more rational to infer that the presence of the priest, however desirable for many obvious advantages, was never made necessary.

If it should be said that a deacon is respected as a minister of religion, and that his intromission may supply the absence of a priest, because the conscience of the parties would be affected in the same manner; I answer, that the Presbyterian minister in Ireland might for the same reason be substituted; and, indeed, that the conscience of a Christian would tell him that he is equally bound by such a promise, whether it be or be not environed by a religious ceremony.

If previously to these Constitutions and decrees marriage had been a thing prohibited by law, and requiring to be licensed by a legal sanction, or if it had been a newly-discovered species of contract, which the ruling powers thought likely to be beneficial, and therefore determined upon introducing, there might be strong reason for throwing the burden of proof on those who assert the validity of the marriage. The creatures of positive law can only exist in the form in which that law created them; but the institution of marriage is older than any law; it may be said to exist by the common law of all mankind, subject to all the varying forms which expediency may dictate, and to any consequences that legislation may attach to the neglect of them; but subject to those alone. Nothing in the Old Testament requires the presence of a priest at a marriage; nothing in the New.

[ 812 ]

In the early times of Christianity we have no trace of proof that the priestly benediction or presence was required: up to the period of the Council of Trent, marriages might be contracted throughout Christendom without the intervention of a priest. Then, if the want of that intervention has, by some positive enactment, the effect of annulling the marriage, and if that legislative Act cannot be produced, if no account can be given of its date, or the occasion of its passing, or the authority by which it was established, but I am

REG.  
v.  
MILLIS.

to infer its existence from a variety of circumstances collected from loose language and equivocal appearances,—I must first call attention to the extreme improbability that a proceeding of such immense importance should be left to such an uncertain mode of proof, instead of being promulgated with as much distinctness as the ordinance of the Council of Trent, or our own Clandestine Marriage Act of 1753. But, secondly, I must entreat your Lordships to consider how many obvious reasons there are to induce humane and considerate men to pause before they would attach the pain of nullity to irregularly contracted marriages. The husband would most commonly be responsible for the irregularity; but it is the husband who generally seeks to release himself from the matrimonial obligation. The wrongdoer would be enabled to take advantage of his own wrong, and, for the purpose of indulging in a career of vicious propensity, to sacrifice the rights, the interests, and the honour of those to whom he is bound by the strongest ties which nature and justice can impose.

Besides, in the early stages of society the attendance of a priest might in various cases be impossible, or it might be refused from personal and unworthy motives, which even the Church would strongly condemn in its \*minister. Can we believe that the power of marrying should be left entirely to his caprice, or to the accidental circumstances which might permit or forbid him to visit the district where the parties dwelt? Is it not much easier to believe, and much more respectful to the Church to believe, that while it would issue directory instructions as to the course it required the faithful to pursue, and might even pronounce its censures on any who neglected them, it would yet long pause and deliberate before it assisted parties to take advantage of the defect to nullify their own marriage contract?

[ \*813 ]

Looking to the most ancient authorities among the text writers on general law, I find them frequently declaring that the contract is completed by the act of the parties alone; a strong direct proof that no law of nullity was known in their time, and a challenge to the makers of such a law to proclaim its passing. The opposite opinion of other writers is of much less weight, because their proposition did not rest on opinion, but on positive enactment, that might at once, if it existed, be pointed out. The opinions of learned men on our law are so nearly balanced, that I doubt whether there is any one of the passages that has been quoted against the validity of these marriages, which might not with equal plausibility be so

REG.  
v.  
MILLIS.

[ \*814 ]

construed as to arrange itself on the other side of the argument. Perkins's learned work puts forward some particular propositions, from which it has been inferred that by the old law of England, marriages without the intervention of a priest were no marriages. But he states that the law applicable to the case had in his time undergone alteration. How came it to be altered? How unsettled and varying the law here supposed! How unlike the distinctness and force \*requisite for a severe penal enactment! That which was the law in the time of Queen Elizabeth, must have been the law in the time of Henry III. We accept his admission that such was not the law in the latter reign, but we also deny that it was such in the former. The case in the Year Books, upon which his first opinion was founded, clearly does not support it. I took the pains to translate that case as the argument proceeded, and the learned counsel perceived that Perkins had mistaken its import. No man now contends for it.

Some cases are, however, cited to prove the necessity for a priest's presence at a marriage. *Foxcroft's* is the first. But does it make out the proposition? It proves that the presence of no less a priest than the Bishop of London was not sufficient. If the decision is correct, the marriage must have been vitiated for some other circumstance, and those that accompanied the marriage were no doubt singular. Another of these decisions was *Del Heith's* case, in which no priest but the parish priest was held sufficient to solemnise a marriage. These decisions are evidently of no value, because they prove too much. So also in modern times, when *Scrimshire v. Scrimshire* (1) was decided by Sir E. SIMPSON against a marriage celebrated by a Roman Catholic priest, he committed an error now condemned by the unanimous voice of all lawyers. These are manifestly worthless decisions, and we shall vainly attempt to select from them any sound principle.

[ \*815 ]

Most of the other cases appearing in our later reports may be employed by ingenuity on either side. Such is *Bunting v. Lepingwell* (2). I feel that neither \*party can claim it as conclusive. It was very carefully sifted yesterday, with some fresh light thrown upon it by a more correct translation of the Latin record. I do not think it necessary to comment more largely on the facts; but it suggests the remark, that another fallacy appears to have insinuated itself into the argument, with reference to the meaning of those weighty words, "a contract *per verba de presenti*." They

(1) 2 Hagg. Cons. Rep. 395.

(2) 4 Co. Rep. 29; Moor. 169.

seem to have been taken to import a present agreement to marry at a future time, and not an agreement presently executed, whereby the parties declared themselves man and wife at that very moment. If the former meaning should prevail, we all allow that it could only found a right to sue for the completion of the contract, or for damages on breach of the promise; but the latter is, beyond all dispute, the true meaning; and thus the question recurs, wherefore is not this executed contract what it purports to be?

REG.  
v.  
MILLIS.

So much reliance has been placed on one authority that I cannot excuse myself from a full consideration of it; it is a case supposed to be stated as law by Lord Hale, and appears in a note to Coke upon Littleton (1). The case was this: A. entered into a contract of marriage with B.; A. then actually married in church another person; then B. compelled A. to perform the marriage ceremony with B. by sentence of the Court. A., the husband, in the meantime between the sentence and the solemnisation, had conveyed away his land *per fraudem mediate*, during the time of the excommunication which he had incurred by disobeying the sentence. The Court of Common Pleas had held, that on the death of A., the wife to whom \*he had first contracted himself, and whom he had been thereupon compelled to marry by sentence of the Spiritual Court, was entitled to her dower out of the lands which he had alienated during that interval. From the judgment of the Common Pleas an appeal was preferred before some Court bearing the style and title "*Coram Rege et Concilio*," and the judgment is there said to have been reversed; and by the appellate jurisdiction the wife was held to be thus cheated out of her dower.

[ \*816 ]

Now, first, on the nature of the points decided, it appears to me that the opinion of the inferior Court was sound and just, and that the opposite doctrine upon its own face condemns itself. It is to me perfectly clear that the marriage solemnised between A. and B. in the face of the Church had relation to the time of the contract, and set up that contract as binding from that time. It could not otherwise supersede the later marriage performed in the face of the Church and with all its forms, nor render illegitimate the children of such later marriage. That this was its operation was proved by the quotation of Lord Chief Justice TINDAL from Rolle's Abridgment, where it is said that a divorce by reason of precontract bastardises the subsequent issue. Then, by the principle of relation, all things stood in the same

(1) 33 a, n. 10.

REG.  
MILLIS.

position, as to the rights of the several parties at the time of the solemnisation, which they had occupied at the period of the contract; and whatever rights the wife at that time enjoyed over her husband's land, she must have retained at that of the solemnisation. It seems to follow as a consequence, or rather to be the self-same proposition, that by alienating the land at a subsequent period, the husband could defeat no right of hers to dower; and this is the more strikingly true, \*because fraud is found as a fact in the case. Another peculiarity belongs to the transaction which formed the subject of that antiquated lawsuit: the husband was actually excommunicated at the time of alienating; that is, he was in a condition in which a man is disabled from performing any act whatever, or entering into any of the ordinary transactions of life; yet this his act was permitted to be available for the very purpose of getting rid of an obligation clearly created against him, in favour of his wife, by a contract afterwards carried into effect through the medium of that very sentence of excommunication.

[ \*817 ]

Observations alone upon a case we may think insufficient to destroy its authority, if emanating from a jurisdiction known to the law and constitution of the country; but from what Court does this extraordinary judgment come? "*Coram Rege et Concilio*" has been said to describe a Court of very high authority, composed of some of the eminent Officers of State and Judges; but on looking at Lord Hale's Treatise on the Jurisdiction of this House, I find that such Court is not the only one indicated by the title just mentioned. There are many. One of them should seem to be this very House of Parliament, which is now in deliberation on the law there laid down; if, indeed, this House had in the time of Edward I. a separate existence. "Sometimes," says Lord Hale, "we shall find, and that very often, that the style '*Coram Nobis et Concilio*,' generally, in Parliament time, is intended of the Lords' House, as appears by the precedents thereof in the writs of the King or petitions of error in both Houses."

Now, I must inquire what knowledge we possess of the judicial proceedings of the Lords' House, or of the Parliament, in the reign of Edward I. ? \*Are we sufficiently aware of the principle on which they acted; whether they held themselves bound by law, or thought it right to resort to some notions of equity, or, finally, assumed the freedom of disposing *pro re natâ*, according to the circumstances of families, of the interests of their several members? Whether they professed to apply the law, or to do equity, or to confer

[ \*818 ]

favours, we may believe that individual canvassing or powerful influence might not be altogether excluded from their minds; and this may account for the fact which is stated to me, that, except this single and most questionable decision, not a judgment or a *dictum* of that Court, whatever it may have been, is reported in any one of our books. That case is, however, supposed to derive great authority from the adoption of Lord Hale. Now, what is the adoption of Lord Hale? We are informed, in the preface to the 13th edition of Coke upon Littleton, which was commenced by Mr. Hargrave, and brought to its conclusion by Mr. Butler, that the notes there appearing “were transcribed from a copy of Lord Hale’s manuscript notes in the margin of Coke upon Littleton, presented by Lord Hale” to a gentleman named. The utmost effect, then, that can be given to the note in question is, that it may have been copied out by Lord Hale from some old work not now in existence, and the result of it summed up by him in few words. How does that import any approbation by Lord Hale of the doctrine? How do I know but that he set it down for the sake of controverting and refuting it? That is a much more probable reason for his copying it out, when we recollect his known opinions upon the general subject, and his little disposition to approve of the triumph of fraud on any occasion. No man who ever lived was less \*likely to have gone out of his way to maintain a doctrine so full of doubt, both in law and morals, in a judgment subverting that of the Court of Law in which he himself for a time administered justice. Even if Lord Hale, meditating in his study on ancient and abstruse dogmas, had at the time when he copied the case an impression that it was rightly decided, we ought not to be blinded by our deference to so great a name, and yield up our own reason to every suggestion of another’s mind. This is a duty of the first importance which we owe to our own position. We have lately heard much of the distinction between the *obiter dicta* that may fall from a Judge in the course of a judicial argument, and the principles on which he himself rests the conclusion at which he arrives. But what is merely written by a Judge in his closet is not even an *obiter dictum*. If for any one of the great judicial characters of England this authority could be claimed, Lord Hale would assuredly be that man; but I am most confident that he would have repudiated the claim for himself. One of his warmest admirers, himself an eminent Judge and a most useful writer on the law, Sir Michael Foster, actually published, among his famous

REG.  
C.  
MILLIS.

[ \*819 ]



REG.  
r.  
MILLIS.

[ \*820 ]

Discourses, "Observations on some Passages in the Writings of Lord Hale," tending to expose mistakes in those passages. He accounts for those mistakes in his preface to his work on Crown Law(1), by the imperfect state in which the manuscript was left. He observes, "The author's last thoughts were suppressed; and one may venture to say for him, now he cannot speak for himself, that the Summary, a collection of extracts hastily put together at different times and in the hurry of a public employ,—mere hints for private use, though thrown \*into some method, and for the most part placed under proper heads (as his collections upon every subject generally were),—was never intended for the press, nor fitted for it; and that the History itself was not intended by him for public view in the dress in which it now appeareth." But this manuscript marginal note is open to all the objections here enumerated, and more; it is not made part of any treatise, nor thrown under any general head, nor accompanied with any one indication that it agreed with his own opinion at any period of his life. Let me illustrate this remark: it frequently happens that the different members of the same Court derive different impressions from the argument of counsel; they meet to consult, and the most convenient method, perhaps, of testing their opinions is for each to write his own, and afterwards compare them all. The most ordinary result is, that one view is adopted by all, and announced as the unanimous opinion of the Court; and the other, on mature reflection, is deliberately rejected as untenable. Let me now suppose that the opinions of the majority were not recorded in our reports, and that the rejected one, written by a Judge, finds its way from his portfolio to future ages; that rejected opinion would have far more appearance of judicial authority than this manuscript sentence of Lord Hale.

[ \*821 ]

This very long discussion of the manuscript note will, I trust, be forgiven for the importance which has been assigned to it. I have endeavoured to show that it is wrong in principle, deficient in authority, unwarrantably asserted as a judicial opinion, even if shown to represent that of Lord Hale; but wholly denuded of proof that it ever was that great man's opinion; the contrary being far more probable. Yet that rotten case is the corner-stone of the argument \*which has been up to this time successful in the cause now abiding your Lordships' determination.

I pass on to the modern authorities. Their uniform current

REG.  
v.  
MILLIS.

does not indeed commence in very modern times; the doctrine for which I contend having been broached by Noy, when he was Attorney-General, and being stated as the law by a Commission appointed by the Long Parliament in 1644, comprising lawyers of very great authority. These eminent men do not appear as inventors of a doctrine so often taught before, but as the reporters of it from the civil law. They must have received it from their predecessors, as they handed it down to still more eminent members of our profession. Lord HALE, according to my view, adopted it at Nisi Prius, and so earned the vituperation of Roger North. His deliberate opinion we have in his life recorded by Burnet, and his general views went along with it. It is proved, to my entire conviction, to have been the opinion of Lord HOLT, the opinion of Chief Baron COMYNS, the opinion of Lord HARDWICKE, of Mr. Justice BLACKSTONE, of Lord MANSFIELD, of Lord KENYON, of Sir VICARY GIBBS, of Lord ELLENBOROUGH, of Lord TENTERDEN, and of Lord WYNFORD. Now I believe I have mentioned eleven names of the very highest rank in reputation, all of whom appear to me to have taken it for granted, without one dissentient voice, without one single doubt, that a solemn contract of marriage executed *per verba de presenti* does in fact constitute a marriage. This is proved to have been Lord HARDWICKE's opinion by the Marriage Act itself; and the same proof applies to Lord MANSFIELD, who is supposed, nevertheless, to have held the contrary doctrine, from his speech in recommending that Act to the House of Commons. Supposing that speech correctly reported, \*we should not forget that he was then endeavouring to conciliate a very strong and much exasperated enemy, and wished to smooth the way as much as possible to the conclusion. But after he had been above a quarter of a century upon the Bench, we have the doctrine laid down by him, in the case of *Morton v. Fenn* (1), in exact conformity with the principle I have sought to establish. Blackstone avowed this opinion in his inestimable Commentaries, immediately after the passing of that Act. Is Lord TENTERDEN to be considered as rash and violent? One of the most learned and reflecting of Judges, in whose mind, as we all remember, caution was the quality, perhaps, which held undue predominance. Called upon, in the course of the trial of *Beer v. Ward* (2), to decide upon the validity of a marriage before the Marriage Act, he did not shrink from directing the jury in the same manner in which his illustrious predecessors would undoubtedly

[ \*822 ]

(1) 3 Doug. 211, Rosc. n. ed.

(2) MS.

REG.  
v.  
MILLIS.

have directed them; and this was a second trial, so that he knew beforehand that the point would arise. The issue was raised by the Court of Chancery, and he knew that his opinion would be reviewed by Lord ELDON's acuteness and sagacity. "The law of England, as I understand it," says Lord TENTERDEN, "was, that *verba de presenti*, followed by cohabitation, was *ipsum matrimonium*." The cohabitation is universally known to make no difference in this matter, yet I do not think the word was introduced by inadvertence; I rather ascribe it to that caution which led him to reject no circumstance that tended in the smallest degree to countenance his decision in each particular case. But the general doctrine that a contract *per verba de presenti*, though \*without the intervention of a priest, was a valid marriage, he states to have been the old law of England as he understood it. I apprehend that Lord TENTERDEN did understand the law of England, and had as good a right to give a confident opinion upon it as any of the most distinguished men who have at any time appeared in Westminster Hall.

[ \*823 ]

Your Lordships naturally anticipate my reference to an authority greater, if possible, than all of these, though mainly founded upon the deference justly felt to be due to the earlier among them. I need but name it, because no man of education, or possessing those literary habits that indicate a gentleman and a scholar, no one endowed with a liberal curiosity on general matters of the most interesting research, can be ignorant of Lord STOWELL's judgment in the case of *Dalrymple v. Dalrymple* (1). Lord STOWELL there goes through the whole of the authorities, and gives a judgment which never can be forgotten, or read without the highest admiration; but its principal value consists in the clearness of his argument and the conclusiveness of his reasoning. Little did I expect that it could ever be my task to defend this remarkable judgment, now for the first time questioned and repudiated in England. The leading objection to the assertion of its principal doctrine, that it was extrajudicial, I beg leave, with my noble and learned friend, entirely to dispute. I think it is strictly and properly judicial. It is the reasoning upon which he saw that his judgment must be founded, and upon which his mind must have been completely satisfied before he reached his conclusion. Did he possess the knowledge and experience requisite for discerning the \*propositions which were necessary for his argument? He spoke on that department of the law with which he had been for half a

[ \*824 ]

century perfectly familiar, which he had studied from his youth, and was daily applying in his manhood and old age.

REG.  
v.  
MILLIS.

But he is boldly charged with the mistake of supposing that the canon law prevailed in England, whereas we know that by the Statute of Merton the canon law was rejected. Are we really to believe that Lord STOWELL was ignorant of the Statute of Merton; or can we fail to perceive that in declaring the canon law to have prevailed in England, he was not speaking of the whole body of the canon law, but of that part which applies to the subject-matter of his judgment, the law of the marriage contract? That a subsequent marriage was never permitted in this country to legitimate children previously born, he well knew; but that the canon law was the law of England with reference to the mode of contracting marriage (the question before him), not only does Lord STOWELL distinctly affirm, but Lord ELDON, in the case of *M'Adam v. Walker* (1), goes along with him to the full extent. Nor was he taken by surprise or led unawares into a declaration of his opinion, having professed the same in *Lindo v. Belisario* (2), near 20 years before.

Another circumstance was urged in the Court at Dublin, as detracting from the weight of Lord STOWELL's judgment: it seems that he did not know all that is known now; recent discoveries have brought to light new matters of law and history, with which it was his misfortune to be unacquainted. It is even surmised that a different opinion might have been expected from him, if the whole truth had been before him. It \*is to be lamented that these treasures are not pointed out to our attention. I find no new fact, but that the old Saxon laws have been lately printed by order of the Record Commissioners. But the substance of all that is now put forward,—the letters of Popes, Decretals, Constitutions, Saxon Concilia,—all these are things with which Lord STOWELL was conversant from his academic days. Whatever materials they supplied for a contrary decision, were assuredly then urged with zeal and ability by the learned civilians at Doctors' Commons, and by the advocates who conducted Miss Manners's appeal before the Court of Delegates. I well remember the sensation excited by that remarkable composition, the admiration that it excited, and the value that was attached to it. Lord Chief Justice GIBBS and the whole Court of Common Pleas had a speedy opportunity of declaring their adhesion; so has every Judge of every Court, when the point has come under discussion. Considering the circumspection, the

[ \*825 ]

(1) 14 R. R. 36 (1 Dow, 148).

(2) 1 Hagg. Cons. Rep. 216.

REG.  
r.  
MILLIS.

sagacity, the practical wisdom of that great master of the law of marriage, his love of order and discipline, his habitual desire to uphold the controlling power of the Church ; considering, too, the decisions of common-law authority by which it was both preceded and followed, I feel that that doctrine cannot be rejected without undermining the whole fabric of judicial authority.

[ \*826 ]

I turn to another document which commands my highest respect ; the opinion laid before your Lordships by the Judges whom you consulted. To the well-considered opinion of these excellent persons I am so much in the habit of deferring, I feel for them such true regard and attachment, that I cannot differ from them without pain. The language of apology would be misplaced ; it is superseded by the just \*sense of a higher duty. I feel the sentiment so eloquently expressed by Mr. Burke ; who said, on an occasion not indeed very similar, but where he perhaps was no less tempted to surrender what he thought right to his deference for other persons,—after descanting at Bristol on what a representative ought to do for his constituents, he proceeds : “ but his unbiassed opinion, his matured judgment, his enlightened conscience, he cannot sacrifice to you, or to any man, or any set of men : these he does not derive from your pleasure, no, nor even from the law and the constitution ; these are a trust from Providence, and for the abuse of these he is deeply responsible.” With a sense of that weighty responsibility, I am bound not implicitly to abide by the conclusion, but to examine the premises upon which it rests. I have done so with care, and I find no reason to alter the opinion I had formed. If I have been at all successful in what I have had the honour of submitting to your Lordships, some of the arguments there employed have already received some answer.

These narrow limits of time preclude my touching particularly on each matter brought to bear on the question, in the opinion delivered by my LORD CHIEF JUSTICE ; and a whole life would be inadequate to a full discussion of all the points stirred in it. My noble and learned friends have dealt with some of these particulars. I may venture to say that I have not conclusively formed my opinion without weighing them all.

I think the exercise of jurisdiction by the Spiritual Court in these matters is fully explained by the single fact, that mankind in general have wished to sanction the most important of all their temporal concerns by religious solemnities. The same feeling even now

[ \*827 ]

\*prompts the new-married couple in Scotland to request their

minister's presence and benediction, and in this country calls in the clergyman to read the service of the Church over a contract expressly made perfect by the law without his attendance.

REG.  
v.  
MILLIS.

Some religious ceremony was for these reasons found almost uniformly to accompany the contract; but where it was not so accompanied, it was still confessedly binding, for it was often made the foundation of a proceeding in the Court Christian, to have it publicly solemnised in the face of the Church. On this and on other occasions, the spiritual authorities may have refused to assist the parties without the performance of a marriage regular in the minutest point of ritual observance; yet there is nothing to show that the legal power either of Church or State annulled a marriage contract for the want of them.

It does not appear that much reasonable argument can be drawn from the language applied, either in reports of cases or in treatises, to particular stages of the marriage contract. Contract, espousals, marriage, matrimony, are words carelessly employed in ancient times. I do not find a single passage in the writings of Lord Coke or any of our old English text writers which points to nullity as arising from the absence of a priest. The supposed clashing of two marriages, as an argument *ab inconvenienti*, seems to me to assume, in every instance, the point to be proved. The various suppositions made are, in my opinion, neither more nor less than a reiterated *petitio principii*.

The mention of a priest, a ring, a ceremony, in some of the cases, proves no more to me than the desire of the parties there interested in upholding the marriage, to throw away no circumstance which any one might think conducive to establish it; but all and \*each of those circumstances might possibly be of importance to the decision, as evidence of the intention of the parties. Of this disposition we see constant examples, and one was just now observed upon in the conduct of so consummate and experienced a minister of the law as Lord TENTERDEN.

[ \*828 ]

In the remark that no marriage has been held good in our Courts where a priest has not intervened, I think the whole fallacy of the argument may be detected. It plainly shows that the question was not regarded in the only manner which I deem consistent with a just view of the case; for I have shown what strike my mind as strong reasons for thinking that there is no presumption of the necessity of a priest to make a marriage good; but the marriage is good, as being in itself a complete contract, unless the absence of a priest is

REG.  
C.  
MILLIS.

[ \*829 ]

clearly shown to invalidate the marriage by force of some intelligible law. I certainly feel a consolation in coming to this opinion, from seeing, in the statement of Lord Chief Justice TINDAL, that the Judges had determined the cause in some haste, and that there was much fluctuation in the minds of my learned brethren. I know personally that other impressions had been at first made on some ; and confess the utmost difficulty in discovering by what logic their doubts were removed. In furtherance of that statement I may mention, that when differences to a certain degree had existed, the learned Judges appointed a meeting to consider and decide upon them ; and that meeting certainly had a very short duration. How any conversion was effected might have been made apparent to your Lordships if each Judge had separately laid his own views before you, or even if you had been informed of those reasons, at least, in which there was an unanimous \*acquiescence. We, then, who are unhappily compelled to differ from the majority of the Judges, are relieved from the pain of condemning (as some of your Lordships' predecessors have done) judicial advice deliberately resolved upon and uniformly adhered to by the whole body, for reasons approved by all. But the document from which we dissent has not undergone all the consideration that would have been desirable ; it has been adopted after much fluctuation of opinion, and is not, as far as we know, supported by a single reason which all unite in thinking just.

I find it impossible to trouble your Lordships more at length, though many other topics might have been urged in favour of my conclusion. One is, indeed, of so much weight in my mind, that I cannot pass it over in silence ; the clause relating to Quakers' marriages, in Lord Hardwicke's Act of 1753. That clause, clearly contemplating those marriages as good, contracted, as they notoriously were, without a priest, seems to me to prove the undoubted opinion of the Legislature, acting under the guidance of that great lawyer and Judge, that such marriages were valid and binding. To this argument I have seen no answer attempted.

Upon the whole I am most clearly of opinion, that a contract *per verba de præsentì* was, before that Act passed, by the English law a good marriage, *ipsum matrimonium*. From the ground which I have taken, I cannot descend to anything like a compromise on the principle that *communis error facit jus* ; on the supposition that there may be error in the judicial opinion hitherto prevailing, but that it has been committed by so many persons of the highest

authority, that it ought now to be sanctioned by a legislative declaration. I think there is no error in that opinion, \*no proof whatever that the Church would at any time have hesitated to enforce this contract, or to consider it as a marriage for every purpose. I do not believe that any Bishop, in those early times when he was the proper officer to certify whether parties were married or not, or whether the issue were legitimate or not, would have done his duty if he had refused to certify that such a marriage was valid, and the offspring legitimate. It seems to me, that if there has been such a *communis error*, it is not the opinion of the great lawyers and Judges who have been named, but the vulgar notion current in the world confounding solemnisation by a priest with the marriage contract, to which it gave at once authenticity and respectability. The prevalence of that notion is explained by the practice, and has laid hold of the public mind from that propensity to take for granted, which we have so often seen leading to wrong conclusions. In spite of it, however, the judicial mind of England has now for ages held with equal tenacity the opposite faith, not reported in cases (for the prudent usages of men rendered them almost impossible), but from an enlightened consideration of the nature of the contract.

REG.  
T.  
MILLIS.  
[ \*830 ]

A single word more is necessary with reference to the proceeding which has brought this case before your Lordships. It arises in a trial for bigamy; and we are to consider whether the first marriage was good, so as to expose him who contracted it, and afterwards contracted a second, to the punishment assigned by the law to that crime. A doubt was thrown out from high authority, whether the offending party was himself aware that his marriage was good in law, and whether it might not be good for other purposes, yet not for the purpose of making \*him a criminal by contracting another. I am of opinion that such considerations ought to find no place in this or any court of law. If the first marriage be good for any purpose, it is good for the purpose of rendering him, who commits the vicious and cruel act of deserting one wife and deceiving another woman by the pretence of a marriage, a criminal in the eye of the law. The offender takes his chance whether his first contract will be held a marriage, and whether his second will be held a crime; and, not more ignorant of the consequences than many other offenders, he must abide by them.

[ \*831 ]

Whenever this question may call for our decision, I shall feel myself compelled to declare my opinion that the prisoner was duly



REG.  
v.  
MILLIS.

convicted, and that the judgment of the Court of Queen's Bench in Ireland is erroneous.

The case was again adjourned for further consideration.

1844.  
Feb. 23.  
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THE LORD CHANCELLOR :

This, my Lords, is a question of so much importance, embracing such a variety of considerations, and affecting such deep and extensive interests, that I have thought it right, agreeably to the course pursued by my noble and learned friends, to state my opinion upon it in writing ; and with your permission I will read it to your Lordships.

[ \*832 ]

The first and material point for consideration in this case is, as to the effect by the law of England, previous to the Marriage Act, of a contract or engagement of matrimony *per verba de presenti* ; by which I understand a contract of present marriage, for that is the sense in which these words are used in all the \*text writers and reports of decisions upon the subject. "Spousals *de presenti*," Swinburne says, "are a mutual promise or contract of present matrimony ; as when the man doth say to the woman, 'I do take thee to my wife ;' and she then answereth, 'I do take thee to my husband.'"

Such a contract entered into between a man and a woman was indissoluble ; the parties could not by mutual consent release each other from the obligation. Either party might, by a suit in the Spiritual Court, compel the other to solemnise the marriage *in facie ecclesiæ*. It was so much a marriage, that if they cohabited together before solemnisation, they could not be proceeded against for fornication, but merely for a contempt. If either of them cohabited with another person, the parties might be proceeded against for adultery. The contract was considered to be of the essence of matrimony, and was therefore, and by reason of its indissoluble nature, styled in the ecclesiastical law *verum matrimonium*, and sometimes *ipsum matrimonium*. Another and most important effect of such a contract was, that if either of the parties afterwards married with another person, solemnising the same *in facie ecclesiæ*, such marriage might be set aside, even after cohabitation and the birth of children, and the parties compelled to solemnise the first marriage *in facie ecclesiæ*. Such were the effects of a contract of marriage *per verba de presenti*.

A contract of marriage *per verba de futuro*, that is, a contract for

future marriage, might be released, and the Court would not compel, in opposition to the will of either of the parties, solemnisation *in facie ecclesiæ*, though in this case the party refusing to perform the contract might be punished *propter læsionem fidei*. But in the case of a contract of this nature, if it were \*followed by cohabitation, it was then put upon the same footing as a contract *per verba de presenti*, and was followed by the same consequences.

REG.  
v.  
MILLIS.

[ \*833 ]

At present, however, I am directing your Lordships' attention to a contract of marriage *per verba de presenti*, and its legal consequences and effects. They are such as I have already stated, and the authorities upon the subject will upon examination be found to be uniform and consistent.

I shall, in support of this statement, refer in the first instance to Swinburne, in his Treatise of Spousals. The writer lived in the reign of Queen Elizabeth, and was for several years a Judge of the Prerogative Court at York. This treatise is a work of great learning, though tinged with the quaintness so common with the writers of that period. Lord STOWELL makes constant reference to his authority. Swinburne says, "That woman and that man which have contracted spousals *de presenti* cannot by any agreement dissolve those spousals, but are reputed for very husband and wife, in respect of the substance and indissoluble knot of matrimony; and therefore, if either of them should in fact proceed to solemnise matrimony with any other person, consummating the same by carnal copulation and the procreation of children, this matrimony is to be dissolved as unlawful, the parties marrying to be punished as adulterers, and their issue in danger of bastardy. The reason is, because here is no promise of any future act, but a present and perfect consent, the which alone maketh matrimony, without either public solemnisation or carnal copulation; for neither is the one nor the other the essence of matrimony, but consent only. The ecclesiastical laws do usually give to women betrothed only or affianced, the name and title of wife; because in truth the man and woman, \*thus perfectly assured by words of present time, are husband and wife before God and His Church."

[ \*834 ]

In another passage he expresses himself thus: "Spousals *de presenti*, though not consummate, be in truth and substance very matrimony, and therefore perpetually indissoluble, except for adultery." Again he says, "The parties having contracted spousals *de presenti*, albeit the one party should afterwards marry another person in the face of the Church, and consummate the

REG.  
v.  
MILLIS.

same by carnal copulation, notwithstanding, the first contract is good, and shall prevail against the second marriage."

In a subsequent passage he points out the mode of proceeding, "by the laws ecclesiastical of this realm, where a party having contracted spousals *de presenti*, should afterwards refuse to undergo the holy bond of matrimony."

In the case of *Dalrymple v. Dalrymple* (1), so often referred to, and never without just praise, Lord STOWELL, the most learned ecclesiastical lawyer of his age, expresses himself in accordance with the opinions of Swinburne, whose work he cites, and whose authority he sanctions: "The consent of two parties, expressed in words of present mutual acceptance, constituted an actual and legal marriage, technically known by the name of *sponsalia per verba de presenti*; improperly enough, because *sponsalia*, in the original and classical meaning of the word, are preliminary ceremonials of marriage. The expression, however, was constantly used, in succeeding times, to signify clandestine marriages, that is, marriages unattended by the prescribed ecclesiastical solemnities, in opposition, first, to regular marriages; secondly, to mere \*engagements for a future marriage, which were termed *sponsalia per verba de futuro*; a distinction of *sponsalia* not at all known to the Roman civil law. Different rules, relative to their respective effects in point of legal consequence, applied to these three cases of regular marriages, of irregular marriages, and of mere promises or engagements. In the regular marriage everything was presumed to be complete and consummated, both in substance and in ceremony; in the irregular marriage everything was presumed to be complete in substance, but not in ceremony, and the ceremony was enjoined to be undergone as matter of order; in the promise, or *sponsalia de futuro*, nothing was presumed to be complete or consummate either in substance or ceremony. Mutual consent would relieve the parties from their engagement, and one party, without the consent of the other, might contract a valid marriage, regular or irregular, with another person." In a subsequent passage he states that "this country disclaimed, amongst other opinions of the Romish Church, the doctrine of a sacrament in marriage, though still retaining the idea of its being of divine institution in its general origin, and as well on that account as of the religious forms that were prescribed for its regular celebration, an holy estate, holy matrimony; but it likewise retained those

[ \*835 ]

rules of the canon law which had their foundation, not in the sacrament or in any religious view of the subject, but in the natural and civil contract of marriage. The Ecclesiastical Courts, therefore, which had the cognisance of matrimonial causes, enforced these rules; and, among others, that rule which held an irregular marriage constituted *per verba de presenti*, not followed by any consummation shown, valid to the full extent of voiding a subsequent regular marriage contracted \*with another person. The same doctrine," he adds, "is recognised by the Temporal Courts as the existing rule of the matrimonial law of this country;" and he cites *Bunting's* case in support of this position.

REG.  
v.  
MILLIS.

[ \*836 ]

In these passages Lord STOWELL is speaking of the ecclesiastical law of England. No man knew better than he did what that law was, and upon what it was founded. When he mentions the canon law he must obviously mean that portion of the canon law received here, and which forms so considerable a part of the ecclesiastical law of this country. It is impossible to suppose that he should for a moment have lost sight of this distinction.

The same doctrine was stated by Sir EDWARD SIMPSON in his judgment in *Scrimshire v. Scrimshire* (1), pronounced in the year 1752, shortly before the passing of the Marriage Act. His words are these: "The canon law received here calls an absolute contract *ipsum matrimonium*, and will enforce solemnisation according to English rites."

Another authority to the same effect is that of Doctor Ayliffe, the learned author of the *Parergon*. He states that "the ancient canon law received in this realm is the law of the kingdom in ecclesiastical cases, if it be not repugnant to the Royal prerogative, or to the customs, laws, and statutes of the realm." There is in his work a chapter "on Marriage or Matrimony, otherwise called Wedlock." He there speaks of "spousals *de presenti*, commonly called marriage." "The principal thing," he says, "required to a legal marriage is the consent of the parties contracting, which is sufficient alone to establish such a marriage. The Council of Trent," he adds, "declares \*all clandestine marriages to be null and void; but this is not law in England, our law only punishing such marriages with the censure of the Church."

[ \*837 ]

In strict conformity with these opinions is the language of Lord HOLT in the case of *Jesson v. Collins* (2), which has given occasion to so much observation. A suit had been instituted in the

(1) 2 Hagg. Cons. Rep. 395.

(2) 2 Salk. 437; 6 Mod. 155.

REG.  
v.  
MILLIS.

Ecclesiastical Court to dissolve a marriage by reason of a precontract *per verba de presenti*. A prohibition was moved for, upon a suggestion that the contract was *per verba de futuro*, for the breach of which damages might be recovered at common law. But HOLT, Chief Justice, observed in answer, that “though it was *per verba de futuro*, it was a matrimonial matter, and the Spiritual Court had jurisdiction.” In the course of his judgment he stated, as it was very natural for him to do, the distinction between such a contract and a contract *per verba de presenti*. “The latter,” he said, “was a marriage; viz., I marry you; You and I are man and wife; and this is not releasable. *Per verba de futuro*, I will marry you; I promise to marry you; &c.; which do not intimate an actual marriage, but refer it to a future act; and this is releasable; and as it is releasable, the party may admit the breach, and demand satisfaction.” It cannot, I think, be justly said that he went out of his way in making these observations. A distinction had been taken between a contract *per verba de presenti* and a contract *per verba de futuro*, and the ground taken for moving for the prohibition was, that the proper remedy in the latter case was by an action for damages.

[ \*838 ] In the subsequent case, viz. *Wigmore's case* (1), \*the wife sued in the Spiritual Court for alimony. The husband was an Anabaptist, and had a licence to marry, but married the woman according to the forms of their own religion. “*Et per* HOLT, Chief Justice: by the canon law, a contract *per verba de presenti* is a marriage; as, I take you to be my wife; so it is of a contract *per verba de futuro*, viz., I will take, &c. If the contract be executed, and he does take her, it is a marriage, and they,” that is, the Spiritual Court, “cannot punish for fornication.”

We have the high authority, therefore, of this learned and eminent Judge, in accordance with the ecclesiastical authorities to which I have referred; and it is added that the other Judges of the Court concurred in the opinion expressed by the Chief Justice. It has been supposed that Lord HOLT was speaking of marriage contracts, not with reference to the ecclesiastical law of this country, but to the general canon law, because in *Wigmore's case* he used the expression, “by the canon law.” Undoubtedly he did so, but by that expression he could only have meant the canon law received here, and forming part of the ecclesiastical law of this kingdom. It is quite obvious that his observations would have been

perfectly irrelevant (a circumstance very unusual with this distinguished Judge) if the expressions were used in any other sense. I cannot, therefore, accede to this explanation. And why are we to put a forced construction upon his words, when they merely express an opinion relating to the ecclesiastical law, in accordance with the most eminent authorities in this branch of jurisprudence, upon a subject peculiarly belonging to their jurisdiction?

REG.  
r.  
MILLIS.

The only remaining authority to which I think it necessary at present to refer, is that of Mr. Justice \*Blackstone, who states, in the first book of his Commentaries (p. 439), that “any contract made *per verba de presenti*, or in words of the present time, between persons able to contract, was, before the late Act, deemed a valid marriage to many purposes, and the parties might be compelled in the Spiritual Courts to celebrate it *in facie ecclesie*.” It is obvious that the learned commentator considered this statement of the law of marriage as free from all doubt, for he did not think it necessary to cite any authority in support of the position. These Commentaries passed through several editions in the lifetime of the learned author, but no change was made in the passage to which I have referred. I think your Lordships will be of opinion that these references, which might, if necessary, be greatly extended, sufficiently establish what I have stated as to the nature and effect of a contract of marriage *per verba de presenti*, and in opposition to which, I conceive, no authority has been or can be adduced.

[ \*839 ]

There is one branch of this subject which I have already mentioned, but to which I must more particularly advert, because it connects itself closely, as I shall hereafter have occasion to show, with the main question before your Lordships; namely, the judgment that has been pronounced in this case by the Court of Queen’s Bench in Ireland. I have stated that a contract *per verba de presenti* may be enforced against either of the parties to it, although such party may have subsequently been married *in facie ecclesie* to another person, and even after consummation and the birth of children. This is abundantly clear from the statute 32 Hen. VIII. c. 38, which recites, that “Whereas heretofore divers and many persons, after long continuance together in matrimony, without any allegation of either of the parties or any other, at their \*marriage, why the same should not be good, just, and lawful, and after the same matrimony solemnised and consummated, and sometimes with fruit of children, have nevertheless, by an unjust law of the Bishop of Rome, upon pretence of a former contract made and

[ \*840 ]

REG.  
v.  
MILLIS.

not consummated, been divorced and separated, contrary to God's law; and so the true matrimony, both solemnised in the face of the Church and consummated, and confirmed also with fruit of children, clearly frustrated and dissolved." The statute, therefore, proceeds to enact, "That such marriage, being contract, and solemnised in the face of the Church, and consummated with bodily knowledge or fruit of children, shall be deemed, judged, and taken to be lawful, good, just, and indissoluble, notwithstanding any precontract or precontracts of matrimony not consummate with bodily knowledge, which either of the parties so married, or both, shall have made with any other person or persons before the time of contracting such marriage."

This law was pointed against the injustice of dissolving by reason of precontract a marriage solemnised *in facie ecclesie*, and after consummation between the parties; but it left the law, where there had been no consummation, as it stood before. Great dissatisfaction appears to have been occasioned by this change, and very early in the reign of Edw. VI. the statute was repealed, and the law restored to its former state.

*Bunting's* case (1), which has been referred to on both sides in the argument, is an instance of the application of the general rule. This was an action of trespass, and upon a special verdict it was found that John Bunting had contracted marriage *per verba de \*presenti* with Agnes Adingsel, and that afterwards Agnes was married to one Twede, and cohabited with him. Bunting sued Agnes in the Court of Audience, and proved the contract, and sentence was pronounced that she should marry Bunting, which she did. They had issue Charles Bunting, and afterwards the father died. The jury found, that if Charles was the son and heir of Bunting, the defendant was guilty of the trespass. The main questions were these: It was contended that there should have been a sentence of divorce, and that the husband ought to have been a party to the suit; but the Court decided that the sentence against the wife only, being but declaratory, was good, and should bind the husband *de facto*; and that as to the other point, the Court must give faith and credit to the proceeding and sentence of the Ecclesiastical Court, to which the cognisance of the subject of marriage belongs. In this case, then, the effect of a precontract *per verba de presenti* upon a subsequent regular marriage *in facie ecclesie*, which this is stated to have been, was admitted and

[ \*841 ]

(1) *Bunting v. Lepingwell*, 4 Co. Rep. 29; Moor, 169.

sanctioned by the Court of Common Law, for it was resolved that the plaintiff was legitimate, and no bastard.

REG.  
v.  
MILLIS.

I place little reliance upon the terms of the decree of the Spiritual Court, as recited in the special verdict; for, as they do not correspond with the usual form in similar cases, it is probable that the substance only is stated, and that, too, in the language of the pleader.

I have been furnished, by the kindness and industry of Mr. Hope, with a case of a similar nature, extracted from the rolls of the province of York, in which the sentence is set forth in the usual and regular form. The suit, which is of ancient date (in the fourteenth century), is thus intitled: *Cecilia de Portynton versus \*John de Steinbergh and Alicia Cristyndome*, "*quam idem Johannes de facto duxit in uxorem.*" The libel charged that the said John and Alicia contracted a marriage *de facto*, and solemnised the same in the face of the Church. Then follows this allegation, that the said marriage does not and cannot subsist *de jure*, by reason of a precontract, *cum copula*, between the said John and Cecilia. It therefore prays the marriage *de facto* between John and Alicia may be pronounced to have been and to be (*fuisse et esse*) null and void, and that the said John may be adjudged the lawful husband of the said Cecilia, and be compelled to solemnise matrimony with her *in facie ecclesie*, &c. The evidence is set forth, and is followed by the sentence, which dissolves the marriage *de facto* with Alicia, and pronounces it *fuisse et esse invalidum*, and adjudges the said John "*in virum legitimum Cecilie.*" It then proceeds thus: "*et ad solemnizandum matrimonium cum eadem in facie ecclesie, ut est moris, cononice compellendum et coercendum fore decernimus.*" The previous contract was *per verba de futuro*, but it was followed by cohabitation, and was therefore in its legal effect and consequences the same as a contract *per verba de presenti*. The sentence was appealed from, and affirmed.

[ \*842 ]

From this case it appears that the regular course of proceeding was to make the husband of the second marriage a party to the suit, to pronounce a dissolution of that marriage, to adjudge the husband to be the lawful husband of the party to the first contract, and to decree solemnisation in the face of the Church. It further appears from the terms of the sentence, that the dissolved marriage was pronounced to have been and to be (*fuisse et esse*) void, agreeably to the rule of the Ecclesiastical Court, that when a marriage \*voidable by reason of precontract is annulled, it is annulled *ab initio*.

[ \*843 ]



REG.  
t.  
MILLIS.

Lord Coke (1), in speaking of these marriages *de facto* voidable by reason of precontract, expresses himself thus: "So it is, if a marriage *de facto* be voidable by divorce in respect of consanguinity, affinity, precontract, or such like, whereby the marriage might have been dissolved, and the parties freed *a vinculo matrimonii*; yet, if the husband die before any divorce, then, for that it cannot now be avoided, this wife *de facto* shall be endowed, for this is *legitimum matrimonium quoad dotem*; and so in a writ of dower, the Bishop ought to certify that they were *legitimo matrimonio copulati*, according to the words of the writ; and herewith agreeth 10 Edw. III. 35. But if they were divorced *a vinculo matrimonii* in the life of the husband, she loseth her dower." He cites Bracton to the same effect.

Your Lordships will therefore observe, that when a contract *per verba de presenti* between two parties was followed by a marriage solemnised in the face of the Church between one of the parties and another person, the latter marriage was not by reason of the precontract absolutely void, but merely voidable; and, as a consequence of this, that if such marriage were not annulled by sentence of the Ecclesiastical Court in the lifetime of the parties, it could not afterwards be affected; the widow would have her dower, and the children be legitimate.

[\*844]

Such, then, were the principal incidents of this species of contract; the engagement was indissoluble, the parties could not, even by mutual consent, release it; either party might compel solemnisation *in facie ecclesie*; the parties cohabiting together could not be \*punished for fornication, though liable to ecclesiastical censure; either party cohabiting with another person might be punished for adultery; and lastly, such a contract was sufficient to avoid, by means of a suit, a subsequent marriage entered into by either of the parties, and solemnised *in facie ecclesie*.

It must always be remembered that the Spiritual Courts were the sole judges of the lawfulness of marriage, where that question was directly in issue. If the question, whether a marriage be lawful or not, was raised upon a distinct issue in the Courts of Common Law, the rule was that it should be tried, not by a jury, but referred for decision to the spiritual tribunal, and the certificate of the Bishop was conclusive.

The opinions to which I have referred, as to the nature and effect of these contracts, are not, as your Lordships will have observed,

merely those of learned individuals and Judges of the ecclesiastical tribunals; I have also shown that these opinions are confirmed by common-law authorities of the most respected and highest character: that a contract therefore *per verba de presenti* was, at the period to which we are referring, considered to be a marriage; that it was, in respect of its “constituting the substance and forming the indissoluble knot of matrimony” (to use the expression of Swinburne), regarded as *verum matrimonium*, and was followed by such incidents as I have mentioned,—is, I apprehend, clear beyond all controversy.

REG.  
v.  
MILLIS.

But then the same authorities inform us that such marriages were irregular, that they were a looser sort of marriages; that they were not, as Swinburne says, perfect marriages, though equally binding; that, according to Blackstone, they were marriages for many, and consequently not for all, purposes; and that, in order to constitute a regular marriage—a perfect marriage—a marriage with all the consequences belonging to a marriage in its complete and perfect state, solemnisation was necessary; and your Lordships will find that the same ecclesiastical authorities admit in the fullest manner this to be the law, in conformity with the opinions of the temporal lawyers and the decisions of the civil tribunals.

[ \*815 ]

Swinburne (1), in the work to which I have before referred, thus expresses himself upon this subject: “Spousals *de presenti*, though not consummate, be in truth and substance very matrimony. Although by the common laws of this realm (like as it is in France and other places), spousals, not only *de futuro*, but also *de presenti*, be destitute of many legal effects wherewith marriage solemnised doth abound, whether we respect legitimation of issue, alteration of property in her goods, or right of dower in the husband’s lands.” And in another place he says, “Yet do not these spousals, that is *per verba de presenti*, produce all the same effects here in England which matrimony solemnised in the face of the Church doth; whether we respect the legitimation of their children, or the property which the husband hath in the wife’s goods, or the dower which she is to have in his lands; of which effects we shall have better opportunity to deliver our mind hereafter.” Again, “Other effects there be of spousals, whereof some respect the issue or children begotten before celebration of the marriage betwixt those which have contracted spousals, and some have relation to their lands and goods. Concerning their issue, true it is that by the

(1) Of Espousals, s. 17.

REG.  
v.  
MILLIS.  
[ \*846 ]

canon law the same is lawful; but by the laws of this realm their issue is not lawful, though the father and the \*mother should afterwards celebrate marriage in the face of the Church. Likewise concerning lands, by the canon law the aforesaid issue may inherit the same; but it is otherwise by the laws of this realm, for as the issue is not legitimated by subsequent marriage, no more can he inherit his father's land; and as he cannot inherit, no more is she to have any dower of the same lands, for whereas by the laws of this realm a married wife is to have the third part of her husband's lands holden in fee simple or fee tail, either general or special, for her dower after her husband's death, during her life, so that she be above the age of nine years at her husband's death, yet, a woman having contracted matrimony, if the man to whom she was betrothed die before the celebration of the marriage, she cannot have any dower of his lands, because as yet she is not his lawful wife, at least to that effect. Concerning goods, the like may be said of them as hath already been spoken of lands, that is to say, that although by the civil and canon laws, where the man doth gain any of the woman's goods, or the woman gain any of the man's goods, by reason of marriage, spousals *de presenti* or *de futuro*, consummate with carnal knowledge, have the same effect as hath matrimony solemnised, yet by the laws of this realm it is otherwise; so that neither spousals *de presenti*, neither spousals *de futuro* consummate, do make her goods his, or his goods hers; and hence it is that a woman contracted in matrimony, dying before the celebration of the marriage, may make her testament, and dispose of all her goods at her own pleasure, which after solemnisation of the marriage she cannot do without his licence and consent. And on the other side, the man dying intestate before celebration of the marriage, the woman to whom he was betrothed \*surviving cannot obtain the administration of his goods as his widow, which otherwise, the marriage being solemnised, she might do. And the like I read to be observed in divers other countries, as in France and Saxony, where neither he nor she gain any part of the other's goods by being affianced, unless the marriage be solemnised, if not consummate also."

[ \*847 ]

Lord STOWELL, in like manner, in the *Dalrymple* case, states, with reference to these contracts, that "the common law had scruples in applying the civil rights of dower and community of goods and legitimacy, in the cases of these looser species of marriage;" obviously meaning, though in more general terms, to

express the same opinion as Swinburne, whom, among other authorities, he cites for this position.

REG.  
F.  
MILLIA.

The same view of the law was taken by Sir EDWARD SIMPSON in the case of *Scrimshire v. Scrimshire*, which occurred shortly before the Marriage Act; his words are these: "I apprehend, unless persons in England are married according to the rites of the Church of England, they are not entitled to the privileges attending legal marriages, as dower, thirds, &c." And when Mr. Justice BLACKSTONE says "such marriages are valid for many purposes," and therefore not for "all purposes," it is evident his view of the subject was in accordance with that of the ecclesiastical law authorities to whom I have referred.

The same opinion is expressed by Lord HOLT in the case before referred to. He thus expresses himself: "In the case of a Dissenter married to a woman by the minister of a congregation, not in orders, it is said that this marriage is not a nullity, because by the law of nature the contract is binding and sufficient; for though the positive law of man ordains that marriages shall be made by a priest, that law only makes \*this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England to entitle to the privileges attending legal marriages, as dower, thirds, &c."

[ \*848 ]

In a learned work, written in a popular form, on the subject of marriage, published in the year 1632, intitled "The Woman's Lawyer," and which has been ascribed to Mr. Justice Doddridge, is the following passage: "If Titus and Sempronia by words *de presenti* in a lawful consent contract marriage, they are man and wife before God; but public celebration according to law is it which maketh man and wife in plain view of law. One nail keepeth out another, and a firm betrothing forbiddeth any new contract; yet they which dare play man and wife only in the view of heaven and closet of conscience, let them be advised how they shall take the advantages or emoluments of marriage in conscience or in heaven; for, on earth if the priest see no celebrated marriage, the Judge saith (1) no legitimate issue, nor the law any reasonable or constituted dower." This agrees with the other authorities. I refer to it principally on account of its date. It shows what was the generally received opinion upon the subject at that period.

The next point for consideration, therefore, will be, how far these opinions are supported by the decisions of the Courts of Common

(1) *Sic: qu.* "seeth."

REG.  
v.  
MILLIS.

[ \*849 ]

Law. First, then, as to dower, and the case cited with respect to it from Lord Hale's Manuscripts. An account of these manuscripts is given by Mr. Hargrave, in the preface to his edition of Coke upon Littleton. There is no doubt they were copied from originals in the handwriting of Lord Hale. The case is this: A. contracts, *per verba de presenti*, with B., and has issue by her, \*and afterwards marries C. *in facie ecclesiæ*; B. recovers A. for her husband by sentence of the Ordinary; and for not performing the sentence he is excommunicated, and afterwards enfeoffs D., and then marries B. *in facie ecclesiæ*, and dies; she brings dower against D., and recovers, because the feoffment was *per fraudem mediate* between the sentence and the solemn marriage, *sed reversatur coram Rege et Concilio quia predictus A. non fuit seisitus* during the espousals between him and B.

There is, I think, no sufficient foundation for the suggestion that this was not a decision by one of the regular tribunals of the country. It was obviously not considered by Lord Hale as liable to this objection. But as the suggestion has been made, it is proper to observe, that upon the point we are now considering, viz. whether a contract *per verba de presenti*, without solemnisation, would entitle the widow to dower, the Court below and the Court of Appeal entertained the same opinion. The Court below decided the case on the special ground of fraud, because the alienation by the husband had been made *per fraudem mediate* between the sentence and the solemnisation, for the purpose of defeating the claim of the wife. It is plain that they would not have taken this as the ground of decision if they had considered that the husband's seisin after the contract, and before the solemnisation, would have entitled the wife to dower. Both the Court below and the Court of Appeal agreed therefore in this, that the seisin of the husband after the contract, and before solemnisation, would not support a claim to dower.

[ \*850 ]

Perkins, whose authority has always stood deservedly high in our Courts, states, in his valuable Treatise on the Laws of England, and in conformity with the \*above decision, that if a man seised of land in fee make a precontract of matrimony with J. S. and die before the marriage is solemnised, she shall not have dower, for she never was his wife. It has been supposed that this might have been the case of a contract *per verba de futuro*; but it is, I think, manifestly impossible to put such a construction upon the passage. It would have been altogether idle to have made such

a statement as to the law, for it never was and never could have been supposed that a mere contract *per verba de futuro* could give any right to dower. And what reason is there for making so strained a supposition, where the law, as thus stated, conforms with the decision in the case mentioned by Hale, and with other authorities?

Perkins further goes on to say, that it was holden in the time of King Henry III., that if a wife was married in a chamber she should not have dower by the common law; but he adds, the law is contrary at this day. So that at that period (the reign of Henry III.) it appears that nothing short of a solemnisation *in facie ecclesie* would entitle a woman to dower. Fitzherbert's *Natura Brevium*, 150, is to the same effect: "A woman married in a chamber shall not have dower at common law: 16 Hen. III. *Quere*," he says, "if marriage made in chapels not consecrated, &c. ? for many are by licence of the Bishop married in chapels, and it seemeth reasonable that in such cases she shall have dower."

I pass from the question of dower to that of legitimacy. One of the earliest cases upon the subject is that of *Del Heith* (1), so frequently mentioned, which was decided in the 24 Edw. I. It was as follows: John Del Heith, brother of Peter Del Heith, held \*lands in Bishopsthorpe near Norwich, and kept a woman, named Katharine, in concubinage, by whom he had two children, Edmund and Beatrice. Being taken ill, he was advised by the Vicar of Plumstead, for the good of his soul, to marry her. As he was unable to go to church, the ceremony was performed in his own house by the Vicar, when the said John Del Heith pronounced the usual words, and placed a ring upon her finger; but no Mass was celebrated. From that time the parties lived together as man and wife, and had another son called William. On the death of John Del Heith, his brother Peter entered upon his lands as his next heir; but a writ of ejectment was brought by the said William, as son and heir of the deceased. It was asked on the trial whether any espousals were celebrated between his parents in the face of the Church, after his father recovered from his illness? And because it was not proved that John Del Heith was ever married to Katharine in the face of the Church, the jury found that the plaintiff had no right to the lands; thus proving that he was illegitimate.

*Foxcroft's case* (2), which occurred in the same reign, viz. in the 10 Edw. I., is to the same effect. The marriage not having been

REG.  
T.  
MILLIS.

[ \*851 ]

(1) Harl. MSS. 2117; Rogers' Ecc. Law, 584. (2) 1 Roll. Abr. 359.

REG.  
r.  
MILLIS.

solemnised *in facie ecclesiæ*, the issue was held to be illegitimate. These cases it is said ought to be disregarded, as being manifestly contrary to law; solemnisation *in facie ecclesiæ* never, as it is assumed, having been necessary to the validity and full effect of a marriage.

[ \*852 ]

Why this is to be assumed, in opposition to these express decisions, it is not very easy to understand. *Foxcroft's* case is taken from Rolle's Abridgment, a \*work always held in great estimation, and he refers to the Year Book as his authority.

The case is cited without any doubt or question in the Digest of Chief Baron Comyns, and in other similar compilations; and it was quoted as an authority, though for a different purpose, by Lord ELDON and Lord ELLENBOROUGH, in the case of the *Banbury Peerage*. Upon what principle, then, is it to be assumed that in the reign of Edward I., marriage *in facie ecclesiæ* was not considered necessary upon a question of legitimacy, in opposition to these decisions, and especially when we find it stated by Perkins that in the reign of Henry VII. it was essential in the case of dower; and which is also stated by Fitzherbert, in his *Natura Brevium*? When the Spiritual Court decreed a marriage, it always decreed it to be solemnised *in facie ecclesiæ*, and every other marriage was irregular and clandestine.

Upon this question of legitimacy it is material to observe, that Goldingham, one of the civilians called in for the assistance of the Court in *Bunting's* case, stated, that if issue be born after the contract of marriage (he is speaking of a contract *per verba de presenti*), and before the solemnisation, such issue is legitimate; but he adds, that is when espousals afterwards take place, for if espousals do not succeed, the issue, he says, born after the contract, will be illegitimate; and this was not controverted by the civilian who argued on the other side. When he says that the issue would be legitimate if espousals afterwards take place, he is evidently referring to the doctrine of relation, which was always rejected by our law.

[ \*853 ]

Another authority to the same effect is Godolphin, who states in his *Repertorium Canonicum*, that "by the common law he or she that is born before marriage \*celebrated between the father and mother, is called a bastard."

When the question of legitimacy depended on the lawfulness of the marriage, it was tried on the issue of *ne unques accouple* in loyal matrimony; the same as in dower. But it is, I think, clear that a contract *per verba de presenti*, without solemnisation, would not

REG.  
v.  
MILLIS.

entitle the wife to dower. It follows, therefore, that upon the issue of *ne unques accouple*, &c., the Bishop must, in a case of dower, have certified against the marriage, or the rule of law in the case of dower must have been defeated. But the issue being the same upon the question of legitimacy, there must have been the same certificate; and as the certificate is conclusive, there must consequently have been the same result.

In the case of *Wickham v. Enfield* (1), which has been cited, the Bishop, instead of the usual form of certificate, returned that the parties were coupled in *vero matrimonio sed clandestino*. The Judges, upon exception to the certificate, determined it to be sufficient. They considered *verum* to be equivalent to *legitimum*; for they were all one, it was said, in intendment, and that the return was not affected by the addition of clandestine. The finding that the marriage was clandestine was not inconsistent with its being *legitimum*, for though performed by a priest it might still have been clandestine.

If it is supposed that a contract *per verba de presenti* would confer the right to dower, and that the issue would be legitimate, this consequence might ensue: Suppose after such a contract the man were to marry another woman *in facie ecclesie*, and have issue and \*die, the second wife would clearly be entitled to dower. Could the first be also entitled? There could not be two contemporaneous marriages with the same man, entitling two women to dower and out of the same estate. Again, the issue of the second marriage would be clearly legitimate. If the man had sexual intercourse with the first woman after the second marriage, and had issue by her, could such issue be legitimate? There could not be two legitimate children of the same father, born of two contemporaneous marriages.

[ \*854 ]

There is another distinction between a contract *per verba de presenti* and a regular marriage, which relates to their effect upon the property of the respective parties: "If a contract of marriage be between a man and a woman, yet one of them may enfeoff the other, for yet they are not one person in law, inasmuch as if the woman dieth before the marriage solemnised between them, the man unto whom she was contracted shall not have the goods of the wife as her husband, but the wife may make a will thereof without the agreement of him unto whom she was contracted; but after the marriage celebrated between them the man cannot enfeoff his

(1) Cro. Car. 351.



REG.  
v.  
MILLIS.

wife, for then they are one person in law." It is evident that Perkins in this passage is speaking of a contract of marriage *per verba de presenti*; and this, therefore, is another instance of the different legal effect of such a contract and a regular marriage.

[ \*855 ]

Lord Hale, at the conclusion of the case reported by him, adds these words: "*Nota*, Neither the contract nor the sentence was a marriage." By which he may perhaps have meant, not such a complete marriage as to give a right to dower. The observation of Perkins, that she never was his wife, made in the cases to which I have referred, ought perhaps to be \*taken with the same qualification. Lord Coke, speaking of the effect, after the death of the husband, of what he calls an inchoate marriage, says it shall be accounted a lawful marriage *quoad dotem*.

Another and a very important circumstance in which these irregular marriages differed from a marriage solemnised according to the rites of the Church, is, that neither party could maintain a suit against the other for the restitution of conjugal rights. The law is so laid down by Sir EDWARD SIMPSON in the case of *Scrimshire v. Scrimshire*, and cannot, I think, be doubted.

So also as to the right to administer to the effects of a deceased wife, a contract *per verba de presenti* has been considered insufficient. That was the case of *Haydon v. Gould* (1). There was a contract *per verba de presenti*, and the parties afterwards cohabited as man and wife for several years; but it appearing that the person who performed the ceremony was not in orders, but a mere layman, which was known by the parties, the letters of administration were recalled by the Court; and upon appeal the sentence was affirmed by the Delegates. This decision does not appear to have been ever questioned. It is cited with approbation by Sir WILLIAM WYNNE, and referred to without any doubt as to its soundness by Sir JOHN NICHOLL.

[ \*856 ]

It was argued in that case that the marriage was not a mere nullity; that it was irregular only, but not void; that it was sufficient by the law of nature, though the positive law ordained that it should be by a priest. But it was said in answer, that the man demanding a right due to him by the ecclesiastical law, must prove himself \*a husband according to that law. The decision in this case is another instance in accordance with those which I have already mentioned, of the civil effects of a regular marriage being

(1) 1 Salk. 119.

withheld from a contract *per verba de presenti* not duly solemnised according to the rules of the ecclesiastical law.

REG.  
v.  
MILLIS.

A further and perhaps the most essential circumstance in which a contract *per verba de presenti* differed from a regular and perfect marriage, is that to which I have already adverted; viz. that if a man, after having entered into a regular marriage, married a second time, his first wife living, the second marriage was absolutely void, and the issue of course illegitimate. But where the first engagement was merely a contract *per verba de presenti*, the second marriage was only voidable; and if not set aside during the lifetime of the parties it could not afterwards be questioned, and the issue would be legitimate. This is abundantly clear from the passage which I have already cited from Coke [upon] Littleton, as well as from other authorities.

The subsequent decisions of the Courts of Common Law, until we come down to comparatively modern times, are not at variance but in conformity with the previous authorities.

In *Welde v. Chamberlaine* (1), which was an issue marriage or no marriage, a contract *per verba de presenti* was proved; but the doubt suggested was, that as there was no ring the ceremony was invalid, as not conforming to the Book of Common Prayer. PEMBERTON, Chief Justice, inclined to think that a contract *per verba de presenti*, repeated after the parson in holy orders, was sufficient; but he reserved \*the point for the consideration of the Court. It is obvious, therefore, that a mere contract *per verba de presenti* was considered in that case to be insufficient.

[ \*857 ]

So, in *Holder v. Dickeson* (2), VAUGHAN, Chief Justice, was of opinion that a priest was necessary for the marriage. The other Judges did not differ from the CHIEF JUSTICE in this respect, though they consider it unnecessary to aver *quod obtulit se* in the presence of a parson, which was the objection made to the declaration.

In *Paine's* case (3) it was said, that in a suit for dissolving a marriage on the ground of precontract, the parties contracting became husband and wife by the effect of the sentence, without further solemnity; and Noy's authority was cited for this position. But TWISDEN, Chief Justice, denied this, and said the marriage must be solemnised before they could be completely baron and feme. This opinion expressed by the CHIEF JUSTICE corresponds with what

(1) 2 Show. 300.  
(2) 1 Freem. 95.

(3) 1 Sid. 13.

REG.  
T.  
MILLIS.

was stated in *Bunting's* case, and the other more ancient authorities upon the subject.

It is obvious that none of these cases impeaches the doctrine stated both by the ecclesiastical and temporal lawyers, as to the imperfect effect, with regard to its civil consequences, of a contract of marriage *per verba de presenti*, not accompanied or followed by due solemnisation. It is not immaterial to observe that the cases occurred before the Marriage Act, when the subject was much more familiar to both classes of lawyers, ecclesiastical as well as temporal, than it has been since the change introduced by that statute.

[ \*858 ]

I have come, therefore, to this conclusion, that although a marriage contracted *per verba de presenti* \*was indissoluble,—though it could not be released even by the mutual consent of the parties,—though either of them might enforce it, and compel solemnisation,—though it had the effect of rendering a subsequent marriage solemnised *in facie ecclesie*, even after cohabitation and the birth of children, voidable,—though it was considered to be of the essence and substance of matrimony, and was therefore, and on account of its indissoluble character, styled in the ecclesiastical law *verum matrimonium*,—yet by the law of England, according to the concurrent opinion of both the ecclesiastical and temporal lawyers, this irregular and looser sort of marriage did not confer those rights of property, or the more important right of legitimacy, consequent on a marriage duly solemnised according to the rites of the Church. Whatever name, therefore, is given to the connexion, this is, I conceive, a correct description of the situation of the parties who, previously to the Marriage Act, had entered into a contract of marriage *per verba de presenti*, not followed by solemnisation.

Various questions and considerations connected with this subject have presented themselves in the course of these discussions, and to which I shall shortly advert. First, as to the religious ceremony :

It appears from the authorities to which I have referred, that it was formerly considered essential to the full effect of a marriage that it should be solemnised in the church. The ceremony is well known ; it had been in use for many hundred years, and corresponded in substance with the present form. This appears from several ancient manuals, particularly those of Salisbury and York, which are still in existence. The rule as to the necessity of a

public celebration was afterwards relaxed, and it is clear that in \*the Temporal Courts the same consequences attended these marriages as if they had been celebrated *in facie ecclesiae*. I of course accept the case of dower *ad ostium ecclesiae*, which depended upon a particular rule. Such marriages, however, though performed by a person in holy orders, and according to the rules of the Church, were considered to be clandestine, and subjected the parties to the censures of the Church. Two instances are mentioned, in which, according to popular tradition, such censure was pronounced; viz. upon the marriage of Sir Edward Coke with Lady Hatton, and the marriage of the Lord Chancellor Ellesmere. In the former case the censure is said to have been slight, the parties having erred from ignorance of the law; but in no case of this sort, where the marriage ceremony was performed by a person in holy orders, although the parties might be liable to ecclesiastical censure, were they ever compelled to repeat the ceremony in the face of the Church. It is obvious, therefore, that such marriages, though clandestine, were considered by the Ecclesiastical Courts to be complete and lawful marriages, as they indisputably were by the Courts of Common Law. Still, however, the Spiritual Court, when it decreed the performance of marriage, always decreed that it should be solemnised in the face of the Church.

REG.  
v.  
MILLIS.  
[ \*859 ]

A question has been raised as to the celebration of the marriage ceremony by a deacon; and it has been asked, if it was formerly required that the ceremony should be performed by a person in priest's orders, by what authority this change was introduced. It appears, by reference to the ancient rituals, that formerly the sacrament was administered before the nuptial benediction was pronounced, and that, as this could only be administered by a priest, his presence \*was necessary. Marriage itself was also, by the mere nature and force of the contract, considered to be a sacrament; and the solemnisation, therefore, by a priest, might on this ground have been thought necessary; but when, at the Reformation, it ceased to be considered as a sacrament, and when it was no longer required that the sacrament should be administered at the time of the marriage, there was no reason why the ceremony should not be performed by a person in holy orders as a deacon.

[ \*860 ]

It is further to be observed, that in the Act of Uniformity, 13 & 14 Car. II., it is expressly enacted, that certain of the offices contained in the Book of Common Prayer shall be performed

REG.  
v.  
MILLIS.

only by a priest; thereby constructively admitting that the other offices, of which matrimony is one, may be performed by a deacon.

[ \*861 ]

It is said that a marriage may be valid though not performed by a person in holy orders, as in the case stated by Lord STOWELL, in *Hawke v. Corri* (1): "It seems," he says, "to be a generally accredited opinion, that if a marriage is had by the ministration of a person in the Church who is ostensibly in holy orders, and is not known or suspected by the parties to be otherwise, such marriage shall be supported. Parties who come to be married are not expected to ask for the sight of the minister's letters of orders, and if they saw them could not be expected to inquire into their authenticity." I do not very well understand the inference intended to be drawn from this case. It amounts to nothing more than this, that where the law requires the ministration of a person in holy orders, if a man assumes that character under such circumstances as \*to impose upon those who require his ministration, and they, acting fairly and *bonâ fide*, are deceived in this particular, the Court which has to decide on the validity of the transaction, will not suffer them to be the victims of imposition and fraud, but will decree in favour of the marriage. This exception can only apply in cases where, by the general rule of law, the service of a person in holy orders is necessary; and cannot, therefore, be properly used to impeach that rule.

Another question that has been raised, and which bears immediately upon the judgment of the Court below, is this: Assuming that a marriage can be solemnised only by a person in holy orders, whether a Presbyterian minister, regularly ordained according to the rules of the Presbyterian Church, is competent to perform the ceremony between members of the Established Church, so as to give full validity and effect to the marriage?

Holy orders, according to the law of England, are orders conferred by episcopal ordination. This was the law of the Catholic Church in this country, and the same law continued after the Reformation as the law of the Episcopal Reformed Church, distinguished by the appellation of the Church of England. The mode of conferring these orders is prescribed in the Act of Uniformity, 2 & 3 Edw. VI. and 13 & 14 Car. II. Similar laws were passed at about the same periods in Ireland, for the regulation of the Church of that country, which was founded on the same principles and governed

by the same rules as the Church of England. A marriage celebrated by a Roman Catholic priest, as in *Fielding's* case and other instances, has been considered valid. A priest of the Romish Church is a priest by episcopal ordination, \*and his orders are accounted holy orders by our Church. If he conforms to the Protestant faith, and is presented to a benefice, no new ordination is necessary; nor would it, indeed, be proper.

REG.  
MILLIS.

[ \*862 ]

The two Churches of England and Ireland, the same in doctrine, in ceremony, and in discipline, have been united, and the same law which applied to each Church in its separate state has become the law of the united Church. It is said that we admit the validity of the ordination of the ministers of the Church of Scotland, and that by the Act of Union their title, as legally ordained ministers, is valid in every part of the empire. As respects their reverend character that certainly is so, but this conveys no authority out of Scotland. Holy orders in England still mean the same thing as before the union with Scotland, viz. orders conferred by episcopal ordination; and what is required to be done by a minister in holy orders, cannot therefore be done by an ordained minister of the Scotch Church. The question is not affected by the Toleration Acts. These Acts remove penalties and disabilities; they confer no title. The claim made by the Presbyterians in Ireland cannot be supported upon any principle that would not apply equally to every denomination of Dissenters. I respect the character of the Presbyterian ministers of Ireland, their learning and piety; but this is a question of mere legal interpretation, which must be determined without reference to the character or conduct of the parties.

The view I have taken of the effect of a marriage contract *per verba de presenti*, will afford an immediate and satisfactory answer to the inference attempted to be drawn from different statutes passed \*with reference to this subject. I allude, in the first place, to the statute 12 Car. II. c. 33, for confirmation of marriages during the Commonwealth. It is said that if a contract *per verba de presenti* be an actual marriage, what necessity was there for this Act? for the marriages entered into under the ordinance were of this nature. Undoubtedly that is so; but if such contracts were not followed by all the consequences of marriages regularly solemnised, the Act was obviously necessary, and it accordingly puts these marriages on the same footing as marriages solemnised according to the rites of the Church of England. Equally plain is

[ \*863 ]

REG.  
F.  
MILLER.

the explanation of the clause in the statute, by which the validity of these marriages is left to the decision of the Temporal Courts. The reason is obvious: When they were rendered valid and binding by the Act, the question in each instance would not be a question of ecclesiastical law, but merely whether the particular case came within the provisions of the statute.

The same observation will apply to the reasoning founded on the different Acts relating to marriages celebrated by Presbyterian ministers in Ireland and in India. But then it must also be admitted that these Acts would have been unnecessary, if a contract *per verba de presenti* had been attended with the same civil rights as to property, &c. as a regular marriage solemnised according to the rules of the Church. I place very little stress upon the argument that has been founded upon the form of certain of the statutes relating to this subject, some of them being enacting and others declaratory. They appear in a great degree, if I may so express myself, to neutralise each other; and many of them are wholly inconsistent with the notion that the Legislature considered a contract *per verba de presenti* to have the full effect of a regular solemnised marriage.

I must not pass over the observations that have been made upon the marriages of Jews and Quakers. It is said they can only be supported on the ground of their being contracts *per verba de presenti*, or *de futuro* followed by cohabitation.

No such argument can, I think, be justly raised from the decisions respecting marriages amongst the Jews. They are treated in those decisions as a distinct people, governed, as to this subject, by their own religious observances and institutions, among which marriage is included. Speaking upon this subject, Lord STOWELL, in the case of *Ruding v. Smith* (1), observes that “the matrimonial law of England for the Jews is their own matrimonial law; and an English Court Christian, examining the validity of an English Jew marriage, would examine it by that law, and that law only, as has been done in the cases that were determined in this Court on those very principles.” Such are the admitted grounds of decision in the case of Jewish marriages.

The question as to the marriage of Quakers is of more difficult solution. In the case so frequently referred to, before Lord Hale, that learned Judge is reported to have said, that he would not on his own opinion make their children bastards; and he directed the jury to find a special verdict. It would seem, therefore, that the

inclination of his opinion was against the validity of the marriage. If he had considered a contract *per verba de presenti* to have been sufficient, there would have been no difficulty in the case, and he would at once have decided accordingly. Burnet states, that HALE considered "all marriages, \*made according to the several persuasions of men, ought to have their effects in law." It is not improbable, therefore, that this was the ground on which he refused to decide the question. Lord Keeper NORTH, no mean lawyer, though full of religious and party prejudices, considered the point too clear for doubt; and observing upon the course pursued by HALE in this case, made it the ground of a bitter and not very decent attack upon that distinguished Judge.

REG.  
C.  
MILLIS.

[ \*865 ]

In a case mentioned by Mr. Justice WILLES in *Harford v. Morris* (1), and in *Woolston v. Scott* (2) before Mr. Justice Denison, the former of which was the case of a marriage between Quakers, and the latter an Anabaptist marriage, it was held that an action of criminal conversation might be sustained. Mr. Justice Buller, in commenting, in his *Law of Nisi Prius*, on the latter decision, does not suggest as the ground of the judgment that the marriage was valid as being a contract *per verba de presenti*, but observes that it had been doubted whether the ceremony must not be performed according to the rites of the Church: but as this, he says, is an action against a wrongdoer, and not a claim of right, it seems sufficient to prove the marriage according to any form of religion, as in the case of Quakers, Anabaptists, Jews, &c. He rests this class of cases, therefore, upon the distinction made in the Courts of Law between a claim of right and proceedings against a wrongdoer.

In *Green v. Green* (3), which was also the case of a Quaker marriage, it was considered that a marriage according to the forms used among that sect was not sufficient to support a suit for the restitution of conjugal rights.

A question as to the effect of those marriages arose in the case of *Haughton v. Haughton* (4), before Lord Mannors, when Chancellor of Ireland. He decided in favour of their validity, but not on the ground of a contract *per verba de presenti*, but because he considered that they were included in the Irish statute 21 & 22 Geo. III., for the relief of Dissenters. Quakers are excepted from the Marriage Act, but no other Dissenters; and being put in this respect on the

[ 866 ]

(1) 1 Hagg. C. Rep. App. 9.

(2) Bull. N. P. 28.

(3) 1 Hagg. C. Rep. App. 9.

(4) 1 Moll. 611.



REG.  
T.  
MILLIS.  
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same footing with the Jews, it is not an unfair inference that the Legislature intended to place them on the same footing with respect to their marriages, and thus constructively to legalise them. This provision in the Act was considered by Sir WILLIAM WYNNE, in *Sylveira v. Alvarez*, as a strong recognition of the validity of these marriages. In none of the cases is it rested on the ground of the form constituting a contract *per verba de presenti*. Although these marriages, therefore, may afford materials for popular reasoning, they do not, I think, lead to any certain conclusion, or give a greater effect to a contract *per verba de presenti* than is ascribed to it by the authorities to which I have before referred.

I abstain from referring in detail to the convictions for bigamy in Ireland, in the cases of marriages not authorised by the Legislature, because this is the very subject of the present appeal; but I freely admit that the opinions of the learned Judges, under whose direction these convictions occurred, are entitled to the greatest consideration and respect.

Several modern cases have been referred to, in which the question as to the effect of a contract *per verba de presenti* has been more or less considered. I will refer to them in their order.

[ 867 ]

The first is that of *Rex v. The Inhabitants of Brampton* (1), in the time of Lord Ellenborough. In that case the marriage was publicly celebrated by a person officiating as a priest, in a chapel in the town of Cape St. Nicola Mole, in St. Domingo. What Lord ELLENBOROUGH said upon this occasion does not admit of dispute. His words were these: "A contract of marriage *per verba de presenti* would have bound the parties before the Marriage Act; and this appears to have been *per verba de presenti*, and to have been celebrated by a priest;" and, after alluding to *Fielding's* case (2), he adds, "There is this further circumstance, that the ceremony was performed in a public chapel, instead of in private lodgings, as it was in *Mr. Fielding's* case." All this is perfectly consistent with the view I have taken of this subject. In the case of *Lautour v. Teesdale* (3), the marriage ceremony was performed by a Roman Catholic priest in the Black Town, at Madras. This case was the same in principle as the former, except that the ceremony here was performed, not in a chapel, but in a private room, as in *Fielding's* case. Chief Justice GIBBS, a very acute lawyer, stated on that occasion, but unnecessarily,—for the cere-

(1) 10 R. R. 299 (10 East, 282).

(2) 14 St. Tr. 1327.

(3) 17 R. R. 518 (8 Taunt. 830; 2 Marsh. 233).

mony was performed by a priest,—the broad principle, that a contract *per verba de presenti* was before the Marriage Act considered as an actual marriage; but he adds, that doubts have been entertained whether it was so unless followed by cohabitation. There is no foundation for the doubts that were suggested by the CHIEF JUSTICE, and in stating the general position he did not accompany it with any of the explanations and qualifications with \*which it had been stated by Lord STOWELL and other eminent civilians.

REG.  
MILLIS.

[ \*868 ]

In *Beer v. Ward* (1), which was an issue out of Chancery, the

(1) MS. The case of *Beer v. Ward*, which was compromised before the delivery of final judgment, was never published in the professional reports of the Court of Chancery. The opinions of Lord ELDON, as expressed on his granting a new trial in that case, were very much referred to in the arguments in the present case in the Court below, and became again the subject of comment in this House. The reports of these opinions were found only in the newspapers of the day, which were accordingly quoted; and it has therefore been deemed advisable to extract so much of them as applies to the particular point now under discussion.

In that case there was a clandestine marriage, a regular but secret marriage, in 1742. A child had been born in 1739. The legitimacy of that child was in question. It was said that a marriage had taken place in 1736. It was necessary to make the forms of that marriage as few as possible. Lord ELDON refers, in the beginning of his judgment, to the way in which the then *Attorney-General* opened the case to the jury, and makes the following observations on the law which had been laid down to the jury.

“ Lord ELDON: An application was now submitted for a new \*trial, and the principal ground on which it rested was the misdirection of the Judge in point of law. His Lordship then referred to the address of the *Attorney-General* to the jury, and to the speech of the learned Judge in charging the jury with reference to the legal question. That learned Judge had stated that, as he under-

stood the law at that period, a good marriage might be celebrated without the intervention of a clergyman; and he (Lord ELDON) thought that it would be extremely dangerous to deny that such might have been the law at that period. It was to be observed that the remark of the CHIEF JUSTICE applied to marriages *per verba de futuro*, and not *per verba de presenti*; for according to the learned Judge, there must be a cohabitation, and a subsequent declaration in the presence of witnesses. This proposition had been met at the Bar, by stating that such a marriage was not at that period a good and lawful marriage. The objection was in substance that it was, as the *Solicitor-General* put it, ‘bad law.’ The *Solicitor-General* had cited a variety of authorities, and contended that though the marriage was good for some purposes, yet, to render the children legitimate, it must be a marriage *in facie ecclesiæ*.”—*Morning Chronicle*, Thursday, 6th May, 1824.

The Court broke up before the delivery of the judgment was finished, and on the Friday morning (7th May) it was resumed; and then, after going through all the facts of the case, Lord ELDON said that, “under all the circumstances a trial at Bar was in his mind the most advisable course to pursue. The opinion of the Judges upon the point of law might then be obtained, and the facts of the case would then be thoroughly and entirely understood.”—*Id.* May 8th.

“ Lord ELDON here read and commented upon that part of the CHIEF JUSTICE’s charge which relates to the law of marriage in this country, before

[ 611, n. ]

[ \*612, n. ]

REG.  
MILLIS.

same position was stated by Lord TENTERDEN, an extremely cautious and very learned Judge, in his direction to the jury. But Lord ELDON, when the case afterwards came before him, and whose attention had been frequently directed to questions of this nature, appears from the shorthand writer's notes of the case, which I have carefully read, to have cautiously abstained from adopting this position, and, after suggesting some other points for consideration, directed a new trial to be had at the Bar of the Court of King's Bench.

It may be proper to observe, with reference to this last decision, that in the case of *Rex v. The Inhabitants of Bathwick* (1), the Court of King's Bench seem to have considered it necessary that the marriage should have been celebrated by a clergyman, for in any other view of that case the points in controversy must have been wholly immaterial. Lord TENTERDEN was at that time Chief

the passing of Lord Hardwicke's Act. In stating that our law was the same as the law of Scotland, he was inaccurate; for it never was so loose as the law of Scotland; but that was unimportant. That a marriage might have been celebrated without the presence of a clergyman, was a proposition that, with some qualification, it was difficult to deny; that was where the person performing was supposed really to be a clergyman. The case was different where a fraud was intended by one of the parties. The CHIEF JUSTICE's charge went on to say that 'a contract between the parties, followed by cohabitation, and accompanied by a declaration in the presence of witnesses, constituted a good and legal marriage at that period of our history, as it would in Scotland at this day.' There was no doubt that that would constitute a good marriage at present \*in Scotland, as was established in a case the other day in the House of Lords, where it appeared that the husband said in the presence of witnesses, 'Madam, I acknowledge you to be my wife;' and she replied, 'Sir, I acknowledge you to be my husband.' In a few moments afterwards the husband went into another room and blew his brains out. That was held to be a valid though irregular

marriage by the law of Scotland: he said irregular, because there was a difference between a valid marriage and a regular marriage. It was contended in the present case that the attention of the jury ought to have been called to this question: 'Are you sure, according to the evidence, that such a contract had been so made between these parties?' And it was said that the principle laid down by the CHIEF JUSTICE was bad law. Cases were cited to show that though a contract of marriage *de presenti*, before the year 1756, was a good contract (to use the *Solicitor-General's* words), *quoad hoc*, yet it was not a legal and valid marriage of itself; that was, that the issue of such marriage, if the parties were not afterwards compelled to celebrate it *in facie ecclesiæ*, were illegitimate. Now he (the CHANCELLOR) was not considering the question yet; but it seemed to him that another point arose, if that proposition were made out; namely, whether a second marriage, if celebrated voluntarily, would not have the same effect in curing the other, as if its celebration had been made compulsory by the Ecclesiastical Courts." — *Times*, 6th May, 1824.

(1) 36 R. R. 690 (2 B. & Ad. 639).

[ \*613, n. ]

Justice of the King's Bench, and after consideration delivered the judgment of the Court.

REG.  
T.  
MILLIS.

In the case of *Smith v. Maxwell* (1), before Lord Wynford, the only question was, whether in Ireland a marriage in a private house was valid. The marriage ceremony was performed by the curate of the parish, and the learned Judge decided that such a marriage was legal, and that it need not be celebrated in the church. To the same effect was the judgment of Sir JOHN NICHOLL, in *Steadman v. Powell* (2). In \*Ireland, he says, marriage may be had without any celebration *in facie ecclesie* or in the presence of witnesses. By celebration *in facie ecclesie*, he obviously meant in a church, in contradistinction to a private house, where the marriage in question in that case was performed. Lyndwoode's explanation of the terms *in facie ecclesie* is this, "*in conspectu ecclesie, populi scilicet congregati in ecclesiâ.*" The main point in controversy in the case of *Steadman v. Powell* was, whether the priest who performed the ceremony was a Roman Catholic.

[ \*869 ]

The opinion of Lord ELDON, in the case of *M'Adam v. Walker* (3), was pronounced in a Scotch case, and obviously had reference to the law of that country.

If I may refer to the opinion of the several eminent lawyers, both of the Ecclesiastical and Civil Courts, who were consulted upon the subject of marriages in India performed by ministers of the Church of Scotland, it will be found that they all concurred in stating that those marriages were not to all purposes legal marriages, but that they were binding upon the parties, so that a subsequent marriage by either during the life of the other, with a third person, would be invalid. To this opinion I entirely assent.

I fully admit the learning, ability, and experience of the several distinguished Judges to whom I have thus referred: but with the explanations which I have given, I do not see sufficient ground in these opinions to lead me to change my view of this subject, agreeing as it does with what has been laid down by the most eminent civilians, and with the corresponding decisions of the Courts of Common Law from the earliest period of our history.

I have been led, in consequence of the range that \*has been taken in these discussions, and the great and important interests which they involve, to enter into the consideration of this subject more extensively than is perhaps necessary for the decision of the

[ \*870 ]

(1) 1 Ry. & Moo. N. P. 80.

(3) 14 R. R. 36 (1 Dow, 148).

(2) 1 Addams, 8.

REG.  
v.  
MILLIS.

question immediately before your Lordships. The immediate point for decision is, whether the defendant George Millis is, under the circumstances stated in the special verdict, guilty of the crime of bigamy. The marriage in Ireland, which is the first marriage, is not rendered valid by statute, one of the parties being a member of the Established Church. If, therefore, it was not celebrated by a person in holy orders, according to the meaning of those terms in the law of England, it can, I think, operate only as a contract *per verba de presenti*; and the question will be, whether such a contract is sufficient to support the indictment. And upon this point, I confess I should feel great difficulty in dissenting from the opinion of the Queen's Judges, as expressed by the learned CHIEF JUSTICE. "If," he says (*ante*, p. 161), "a marriage *per verba de presenti* without any ceremony is good for the first marriage, it is good also for the second; but," he adds, "it never could be supposed that the Legislature intended to visit with capital punishment (for the offence would be capital if the plea of clergy could be counterpleaded) the man who had in each instance entered into a contract *per verba de presenti*, and nothing more."

But independently of this consideration, it is material upon this part of the subject to advert again to the effect of such a contract. Let me suppose a contract of marriage *per verba de presenti*, and a subsequent marriage duly solemnised by the same man with another woman. The woman dies,—the marriage becomes binding, and the issue legitimate. How can \*a prosecution for bigamy be sustained for entering into a marriage which the law recognises, and will not suffer to be annulled? But if an indictment could not under such circumstances be maintained, neither could it, I conceive, during the life of the woman; for the guilt or innocence of the husband could never be made to depend upon the accident of her life or death.

[ \*871 ]

I may further observe to your Lordships, that it seems never to have occurred to any one, in suits to annul a marriage by reason of precontract, to suggest that the party had been guilty of bigamy. There is no trace of any such intimation; and yet in every one of these cases, if a contract *per verba de presenti* were sufficient for this purpose, that offence must have been committed.

But there is another difficulty in the way of the prosecution in this case, arising out of the change introduced into the law of Ireland by the statute 58 Geo. III. c. 81. It is thereby enacted, "That in no case whatsoever shall any suit or proceeding be had in any Ecclesiastical Court in Ireland, in order to compel a celebration

of any marriage *in facie ecclesie*, by reason of any contract of matrimony whatever, whether *per verba de presenti* or *per verba de futuro*, which shall be entered into after the end and expiration of ten days next after the passing of this Act." This clause is copied from the 13th section of the English Marriage Act. The effect of this statute has been to change entirely the character of a contract *per verba de presenti*, at least as to its temporal effect. It is no longer indissoluble; solemnisation cannot be enforced; it has no longer the effect of avoiding a subsequent marriage solemnised *in facie ecclesie*, but such marriage is from the time of its celebration valid and binding, and accompanied with all the civil consequences of a regular and perfect marriage. How then can such a marriage, which the law sanctions, and the obligations of which it enforces, constitute the crime of bigamy? In this offence it is the second marriage that is the criminal act; such marriage is a mere nullity; it is simply void, and so completely void that the woman may be examined as a witness against the person with whom she has gone through the ceremony of marriage. But in the case of a contract *per verba de presenti*, followed by a subsequent marriage with another person duly solemnised, the second marriage is, on the contrary, by the law of Ireland, legal and binding.

REG.  
v.  
MILLIS.

[ \*872 ]

It cannot, I think, be contended, at least with any effect, that as the Act in its terms only prevents a proceeding to enforce the performance of the marriage contract, a suit may still be instituted for annulling a subsequent marriage solemnised *in facie ecclesie*. It is not, I think, very reasonable to suppose that such could have been the intention of the Legislature. For what purpose could such a proceeding be had, unless with a view of enforcing the performance of the first contract, which the statute declares shall no longer be done?

Sir William Blackstone appears to have entertained the same opinion upon the construction of the English Marriage Act, which contains precisely the same provision; and from that time to the present, a period of nearly a century, no such suit has ever been instituted, or, as far as I can learn, ever contemplated.

I am of opinion, therefore, after much anxious consideration, for the reasons and upon the grounds which I have thus stated to your Lordships, but at the \*same time with all due deference and respect for those who differ from me on the subject, that the indictment against the defendant, George Millis, cannot be sustained.

[ \*873 ]

REG.  
v.  
MILLIS.

LORD COTTENHAM :

I have not, in the course of a pretty long professional life, met with any case so embarrassing as the present. It is impossible to come to any conclusion without overruling authorities to which the greatest possible respect is due. The highest names in the history of the law stand opposed to each other. If the conclusion to which I have felt myself compelled to come be erroneous, the error has not arisen from any prepossession of my mind. The many great modern authorities who have expressed opinions inconsistent with the judgment under review; the presumption that the law of this country respecting marriage, previous to the Marriage Act of 26 Geo. II. c. 38 (1753), had been the same as prevailed in other countries which derived their law upon that subject from the same source; and a consideration of the great evils necessarily attendant upon a confirmation of the judgment,—had raised in my mind a very strong impression that the judgment was erroneous, and no slight wish that it might be found to be so. It was not until I came to examine in private the early authorities, and to consider the weight of the objections which have been raised to them, that I found it impossible, consistently with the duty I owe to this House and to the public, to adopt any conclusion but that to which these authorities uniformly and of necessity lead.

[ \*874 ]

It is to be observed in the outset that the present inquiry is as to the state of the law as it existed before 1753. Ninety years have elapsed since that \*state of the law has ceased to exist in this country; a circumstance which adds greatly to the difficulty of the inquiry, and which it is of the utmost importance to keep in mind, when striking the balance between the authorities which preceded and those which followed that date. The former arose in administering the then existing law, and proceeded from Judges necessarily conversant with all that affected the important subject of marriage. The latter consist principally of expressions of impressions of what the law had been at former times, and of the administration of which the authors of those opinions probably never had, or had ceased to have, any experience; and it is obvious that the observation applies the more strongly to those authorities which are the most removed from the time at which this law, by the passing of the Marriage Act, ceased to exist in this country.

The question is, did a contract of marriage *per verba de presenti tempore*, without the intervention of a priest in holy orders, constitute a valid marriage by the law of this country as it existed before the

passing of the Marriage Act? In considering this matter the first question a lawyer would ask is, what decisions are there to be found of that period upon this subject? The answer, I regret to say, must be that there are many, and that all, without any exception, held that such contract did not constitute a valid marriage.

REG.  
MILLIS.

Upon an examination of these authorities the whole question must depend. Since the Marriage Act there cannot have been many occasions of decision upon the subject; and the opinions of modern Judges and writers, however important as commentators upon a law which had ceased to exist, cannot be of avail unless supported by decisions and authorities of the times \*during which the law prevailed. But before I proceed to examine these authorities, it will be desirable to clear the way by disposing of some arguments, which, if well founded, would go far to prove that there could not have been any such decisions; or that if there were any, they must necessarily have been erroneous.

[ \*875 ]

The civil law, it has been said, was the foundation of the law of marriage in Europe, and that by that law, before the Council of Trent, a contract *per verba de presenti* constituted marriage, as it does in Scotland to this day; and that there was no reason to suppose that the marriage law of England was at that time different from the marriage law of other Christian countries; but, on the contrary, as the subject of marriage was under the jurisdiction of the Ecclesiastical Courts, and as there was an appeal from those Courts to Rome, it was to be assumed that the marriage law of this country and of Rome was the same.

Now it is quite certain that the civil and canon law never had, as such, any authority in this country; but, in the language of the statute of 25 Hen. VIII. c. 21, "such laws had effect only so far as the Sovereign and people of this realm had taken them at their free liberty, at their own consent, to be used amongst them; and had bound themselves by long use and custom to the observance of the same." In illustration of which, Blackstone, following the example of Sir Matthew Hale, classes the civil and canon law in use in this country as part of the common or unwritten law. And with respect to the appeal to Rome, Blackstone (1) observes, that the Act of Hen. VIII. which subjected those who should appeal to Rome to the \*penalties of a *præmunire*, only punished that which was illegal before.

[ \*876 ]

The rules, therefore, of the civil and canon law, as generally



REG.  
v.  
MILLIS.

received, cannot materially bear upon the present inquiry; but it is highly important to ascertain what were the rules in this respect by which the Ecclesiastical Courts in this country were regulated; for as the jurisdiction of all questions of marriage has been exercised by the Ecclesiastical Courts ever since their separation from the Civil Courts soon after the Conquest, the law of those Courts must have been at all times the law of the country. It is true that in certain cases in which questions of marriage arose incidentally, as in personal actions, in which the right depended upon the fact of marriage, and not upon its legality, reference was not made to the ecclesiastical authorities; yet as that was the only course in all cases in which the validity of a marriage was directly in issue, in all which cases the Civil Court was bound to respect the certificate of the Bishop as conclusive, it follows that the Civil Courts could not have had any rules but those which they received from the ecclesiastical authorities: and this may account for the fluctuations which appear at different times to have taken place; a clandestine marriage, that is, one not celebrated *in facie ecclesie*, being at some periods treated as void, and at others only as irregular; and a mass-priest being in some cases treated as necessary to give validity to a marriage, and in others, any one in holy orders being considered as sufficient for that purpose.

[ \*877 ]

It is expedient, therefore, to ascertain as far as possible what rules were prescribed to the Ecclesiastical Courts by the authorities within this realm; and if it shall appear that before the time at which the \*canon law is stated to have been introduced into this country, that is, before 1290, there were laws existing which regulated the proceedings and decisions respecting marriage, and which do not appear afterwards to have been altered, it must be of more importance to look to such laws than to the rules of the general civil or canon law; and it appears that there were such laws, and that by those laws the intervention of a person in orders was necessary to constitute a valid marriage. The Institutes of Edmund direct that in nuptials there shall be a mass-priest, who shall with God's blessing join the parties together ("*adunare*" is the word) to all prosperity. And by the ordinance of a council held at Winchester in the time of Archbishop Lanfranc, 1076 (1), it was declared that a marriage without the benediction of a priest should not be a legitimate marriage, and that other marriages should be deemed fornication; and many other provisions against clandestine

(1) Johnst. Ecc. Law; A.D. 1076, s. 5.

marriages prove that such marriages were in fact celebrated by priests.

REG.  
v.  
MILLIS.

I see no reason to doubt the authenticity of these ancient ordinances; and if genuine, they establish the fact that from the earliest time the laws of England upon this subject differed from the civil and canon law, and required the intervention of an ecclesiastical authority to make a valid marriage. If any doubt could exist as to the authenticity of these ordinances, or as to whether they had been adopted by the laws of this country, and had so become part of such law, such doubt would be removed if it should be found that the decisions of the Civil and Ecclesiastical Courts were in conformity with the directions therein contained; which leads to an examination of such reported cases as have been produced for this purpose.

In order to judge of the weight and importance of these decisions, it is proper to consider by what tests the validity of a marriage is to be tried; and it is obvious that the consequences of a valid marriage must be,—

[ 878 ]

1st. To give to the woman the right of a wife in respect to dower.

2nd. To give to the man the right of a husband in the property of the woman.

3rd. To give to the issue the right of legitimacy.

4th. To impose upon the woman the incapacities of coverture.

5th. To make the marriage of either of the parties, living the other, with a third person, void.

Upon each of these heads there is clear authority that none of these consequences followed from a contract of marriage *per verba de presenti*, without the intervention of a person in holy orders.

First, a contract *per verba de presenti* did not give to the woman the right of a wife in respect to dower.

Upon this first point, the note from Lord Hale's MSS. (1), if entitled to credit, and if construed according to the ordinary and technical meaning of the words used, is decisive. As to its authenticity, we are told in the preface to the 18th edition of Coke upon Littleton, that this and the other notes are in the handwriting of Lord Hale, in the margin of a copy of Coke upon Littleton in the possession of Mr. Gymbon, to whose father it was presented by Lord Hale; and that the copy of the notes from which the notes in the 18th edition of Coke upon Littleton were taken, was made from the original, for the use of Mr. Yorke, and then in the possession

REG.  
r.  
MILLIS.  
[ \*879 ]

of the late Lord \*Hardwicke. It appears, therefore, that the note in question exists in the handwriting of Lord Hale, and there does not appear to be any reason for doubting that what was so written by him was his own composition and not copied from any other writing, and that what he states to have been decided was at least believed by him to have been so decided, and that the observations upon such decision were his own.

What then does Lord Hale state to have been decided, and what are his observations upon it? He states a case, *coram Rege*, 9 & 10 Edw. I. in which the facts were, 1st, a contract between A. and B. *per verba de presenti*, and issue; 2nd, a marriage *in facie ecclesie* between A. and C.; 3rd, a sentence by the Ordinary, whereby B. recovered A. for her husband, and excommunication of A. for not performing the sentence; 4th, a subsequent enfeoffment by A. of land to D.; and, 5th, a subsequent marriage *in facie ecclesie* between A. and B., and the death of A.

The decision of the Court below was, that B. was entitled to dower out of the lands of which D. had been enfeoffed, not by force of the contract *per verba de presenti* between A. and B., but because the feoffment between the sentence and the solemn marriage was a fraud; but that was reversed *coram Rege et Concilio*, because there was no seisin in A. during the espousals; and of this Lord Hale expresses his approbation by the note, "Neither the contract nor the sentence was a marriage."

Now it is to be observed that both these judgments assume that the contract was not a marriage. If it had been considered to be a marriage the Court below would have found a seisin in fact during the coverture, and would not have resorted to the ground of fraud, which was applicable only to the supposition \*that the coverture commenced either from the sentence or solemn marriage; and the Court of Appeal proceeded expressly upon the ground that the coverture did not commence until the solemn marriage.

[ \*880 ]

I cannot, therefore, doubt but that at the time of this decree, about 1280, it was considered as clear law that a contract *per verba de presenti* did not constitute a marriage for the purpose of entitling the woman to dower, and that Lord Hale considered the law to be the same at his time.

It has been suggested, that although the words *de presenti* were used, the agreement may have been to celebrate a future regular marriage, which would have made the contract in substance one *per verba de futuro*. This supposition is inadmissible, cohabitation

having followed the contract, which would have given to a contract *per verba de futuro* all the effect of a marriage *per verba de presenti*.

REG.  
v.  
MILLIS.

It has been suggested that the dower to which these cases refer was dower *ad ostium ecclesiæ*; a singular supposition, when the marriage from which the claim arose was clandestine; and if it had been or could be so, no explanation would thereby be afforded. The question of the validity of the marriage would be decided by the same rules. Whatever might be the character of the dower claimed, the want of seisin, and not the want of an assignment *ad ostium ecclesiæ*, was the ground of the judgment.

Secondly, a contract *per verba de presenti* did not give to the man the right of a husband in the property of the woman. This was decided in *Haydon v. Gould* (1), which occurred in the 9th year of Queen Anne. The parties were Dissenters, and the marriage was according to the form of the sect, without the \*intervention of any one in holy orders; cohabitation followed, but the Ecclesiastical Court held that the man was not entitled to letters of administration to the property of the woman. That decision was affirmed by the Delegates.

[ \*881 ]

At this time, in the 9th of Anne, the title of a husband to administer to a wife, which seems to have been at all times recognised, had been confirmed by an Act of Parliament; the statute of 29 Car. II. c. 8, having enacted that the Statute of Distributions, 22 & 23 Car. II. c. 26, should not extend to the estates of *femes covert* that should die intestate, but that their husbands might demand and have administration of their estates, and receive and enjoy the same as they might have done before the making of that Act; thus recognising the previous right, or being at least declaratory of it. The only question in the case could have been, was the woman a *feme covert*, and was the man her husband? That being established, the Ecclesiastical Court would not have had any discretion as to granting administration to the husband; he would have been entitled to a *mandamus* to compel the Ecclesiastical Court to make the grant: *Rex v. Bettesworth* (2).

The decision therefore in *Haydon v. Gould* was, that what had taken place, necessarily including a contract *per verba de presenti*, and cohabitation proved, did not constitute a marriage. The reasoning and suggestion at the end of the case must, I apprehend, be considered as coming from the counsel or the reporter,

(1) 1 Salk. 119.

(2) 2 Strange, 891.

REG.  
MILLIS.

[ \*882 ]

and cannot affect the weight of the decision. The suggestion that the husband, demanding a right by the ecclesiastical law, must prove himself to be a husband according to that law, if supposed to raise any \*distinction between marriage by the ecclesiastical law and the common law, cannot be received as the ground of the decision. The Ecclesiastical Courts, being the sole judges of questions of marriage, could not have had different rules as to its validity, according to the form in which the question might be presented to them. Besides which, the husband's right was so established, and so little in the discretion of the Ecclesiastical Courts, that the Common Law Courts would enforce it by *mandamus*.

The suggestion that the wife and issue might "perhaps" entitle themselves to temporal rights through such a marriage, seems only to mean that the Court might in their case be content with the reputation of marriage, without calling upon them to prove its validity; a distinction recognised in other cases; for it is said that the husband should not entitle himself by mere reputation, without right. This distinction, if well founded, is not material; for in the case of the supposed husband in which the right was examined into, the decision was that there had not been a valid marriage; that is, that she had not been a *feme covert*, and that he had not been her husband.

The law so decided in 1708, 9th Anne, may be traced from a very early period; for Perkins (1) says, that after a contract of marriage between a man and a woman, they are not yet one person in law, inasmuch as in case of the woman's death before the marriage solemnised between them, the man to whom she was contracted shall not have her goods as her heir.

[ \*883 ]

These authorities trace the law from 1865 to 1708, and leave no doubt but that by the law, common as well as ecclesiastical, a contract *per verba de presenti* \*did not establish the relation of husband and wife between the parties.

Thirdly, a contract *per verba de presenti* between a man and woman did not confer upon their issue the rights of legitimacy.

This was necessarily included in the decision of the cases of *Foxcroft* (2) and *Del Heith* (3). In the first of these a marriage by the Bishop of London, and in the second a marriage by a parish

(1) Tit. Enfeoffm. pl. 194, citing Year Book, 38 Edw. III. 12.

(2) 1 Roll. Abr. 359,

(3) Rog. Ecc. Law, 584; Harl. MS. 2117.

priest, was held invalid, and the issue bastards, because there had not been a marriage *in facie ecclesie*. It is obvious that the Courts which so decided must have assumed, and in fact held, that no marriage could be valid by a mere contract between the parties without the intervention of any ecclesiastical authority; for such a contract existed in both the cases. They therefore clearly show the state of the law at the times they took place. But it is said that these cases are not to be relied upon in the present discussion, because they prove too much, in holding that a marriage could not be valid unless celebrated *in facie ecclesie*. It must not be hastily assumed that these decisions went too far, and were therefore wrong, according to the state of the law at the times they were pronounced; for Perkins tells us (1) that it had been holden in the time of Henry III., that if a woman had been married in a chamber she should not have dower by common law, "but the law is contrary at this day;" that is, marriage in a chamber or clandestine, in opposition to a marriage *in facie ecclesie*, but without reference to the intervention of a person in orders, whose celebration of clandestine marriages was the subject of frequent denunciations; and when we observe the fluctuation \*of the ecclesiastical rules upon the subject of marriage, and consider that the Ecclesiastical Court had the exclusive jurisdiction over questions of marriage, we cannot be surprised at these fluctuations in the decisions which took place.

REG.  
MILLIS.

[ \*884 ]

If, however, we assume that these cases went too far; if, as is clearly the case, the larger proposition necessarily includes the minor one, they must be considered as conclusive of the state of the law upon the subject now under consideration. Such decisions could not have been made, indeed the questions which led to them could hardly have been raised, if it had not been considered as certain that a contract *per verba de presenti*, without the intervention of any person in holy orders, did not at those times constitute a valid marriage so as to make the issue legitimate.

The case of *Bunting v. Lepingwell* (2) falls under this head. The special verdict found that the parties contracted matrimony *per verba de presenti tempore*; that the woman afterwards married another man, Twede; that Bunting libelled the woman upon the contract; and that "decretum fuit quod prædicta Agnes subiret matrimonium cum præfato Bunting et insuper pronunciatum decretum et declaratum fuit dictum matrimonium fore nullum."

Now, for the reasons which have been given by my noble and

(1) Tit. Dower, s. 306.

(2) 4 Co. Rep. 29; Moor, 169.

REG.  
F.  
MILLIS.

[ \*885 ]

learned friend who preceded me, and more particularly from the authority which he has cited from the Court at York, it does appear to me that no reliance whatever is to be placed upon that particular expression there used, the word "fore." Undoubtedly, according to the ordinary sense of the word, it would \*have meant "future,"—"something to be hereafter;" but, as it has been well observed, that construction cannot be put upon it, because the sentence of the Ecclesiastical Court was to undo the marriage from the commencement. Now, the word "fore" would seem to show that it had been good heretofore, but that in future it was to be void; but the effect of the sentence of the Ecclesiastical Court was to make void that which was voidable, declaring it void as if it had never had existence.

Bunting and Agnes intermarried accordingly, and had a son, and the question was as to his legitimacy. Now, if the contract of marriage *per verba de præsenti* had constituted marriage, there could not have been any question; for in that case the marriage between Agnes and Twede would have been void, and the issue of Bunting and Agnes would have been clearly legitimate, not by virtue of the sentence or of the ceremony, but by force of the contract *per verba de præsenti*.

It has been suggested as to that case, as well as to the case in Coke upon Littleton (1), that as the parties used words *de præsenti tempore*, the agreement might have been to marry by a future regular marriage, which would have amounted, therefore, only to a contract *per verba de futuro*. Of this there is no trace in either of the reports; and the special verdict, by stating a contract *per verba de præsenti tempore*, and nothing more, precludes any such supposition. The terms have at all times been perfectly well known in the law, and must be taken as used in their ordinary and well-known meaning; but had it been otherwise, the cohabitation which followed would have given the \*same effect to the contract, even if it had been expressed in terms of future promise.

[ \*886 ]

This case proves that in the 27 & 28 Eliz. no doubt was entertained but that a matrimonial contract *per verba de præsenti* did not constitute a marriage so as to legitimise the issue, and make a second marriage between the woman and another man void. Had it been otherwise the proceedings in the Ecclesiastical Court would not have been material, and the second marriage would have been treated as void, and not only as voidable.

REG.  
T.  
MILLIS.

It is also to be observed that the civilian who argued in favour of the legitimacy, as reported in Moor, after stating the rule of the civil law, contended that a child born after the contract and before the espousals, would be legitimate, by the relation of the espousals to the contract, which would make void and adulterous any intermediate marriage, but that if no espousals followed the contract the issue would be illegitimate; and this is adopted by Chief Baron Comyns, for he says (1), "So by a contract of marriage, it is no marriage if espousals do not afterwards ensue; *semble* Moor, 170." These authorities establish the third proposition.

Fourthly, a contract of marriage *per verba de presenti* did not impose upon the woman the incapacities of coverture. Perkins, in the passage before quoted (2), says, that after a contract between a man and a woman they may enfeoff one another, for yet they are not one person in law, but the wife may make a will without the agreement of him to whom she was contracted.

Bracton, in the passage quoted, "*matrimonium \*autem accipi possit sive sit publice contractum vel fides data quod separari non possunt et revera donationes inter virum et uxorem constante matrimonio valere non debent,*" must be understood as describing by the words "*fides data quod separari non possunt*" a good and valid, though a private or clandestine, marriage, as opposed to "*matrimonium publice contractum;*" for he cannot be supposed to have meant a contract of marriage *per verba de presenti* merely, because he cannot be supposed to have meant that such a contract would have been "*matrimonium*" for the purpose of making invalid gifts between the parties, contrary to the law as laid down in the 38 Edw. III., as cited by Perkins.

[ \*887 ]

Fifthly, a contract of marriage *per verba de presenti* did not make the marriage of one of the parties, living the other, with a third person, void.

This proposition, as to the truth of which no doubt has or can be raised, appears to me to be of the highest importance, and to lead irresistibly to the conclusion that such a contract never was considered as constituting a marriage. If a contract *per verba de presenti* were a marriage for the purpose of giving civil rights and enforcing civil liabilities, it would follow that a marriage between one of the parties to such contract, living the other, with a third person, would be absolutely void. If, therefore, such a marriage

(1) Baron &amp; Feme, B. 1.

(2) Tit. Feoff. pl. 194, citing Year Book, 38 Edw. III. 12.



REG.  
v.  
MILLIS.

was voidable only, and good until set aside, and therefore indissoluble after the death of the parties to it, it follows that, as there cannot be two good marriages of the same person subsisting at the same time, the contract *per verba de presenti* was not a marriage for the above purpose; and that such was the case appears to be beyond all doubt.

[ 888 ]

In Rolle's Abridgment (1) it is said, a divorce *causâ præcontractus* bastardises the issue; that is, the sentence makes the issue of the second marriage bastards who were before held to be legitimate. The second marriage was therefore voidable, and not void.

In Coke's Commentary on Littleton (2) it is said, "if a marriage *de facto* be voidable by divorce in respect of precontract or such like, whereby the marriage might have been dissolved and the parties freed à *vinculo matrimonii*, yet if the husband die before any divorce, then, for that it cannot now be avoided, the wife *de facto* shall be endowed, for this is *legitimum matrimonium*." The term used is "precontract," which, it may be said, means a contract *per verba de futuro* as well as a contract *per verba de presenti*. In this case I apprehend that it clearly means the latter. It appears, indeed, from Swinburne (3), and what is said in *Holt v. Ward* (4), that in cases of contract *per verba de futuro*, where no cohabitation had followed, the Ecclesiastical Court did not compel the parties to come together, or do more than admonish them. It is, at all events, clear that the terms include a contract *per verba de presenti*, and it is sufficient for the present purpose that the Ecclesiastical Court in such cases, where one of the parties to the contract had subsequently contracted another marriage, set aside the second marriage and enforced the contract; and that if either of the parties to the second marriage died before such marriage was set aside, it remained good and indissoluble. But if so, is it possible that the contract *per verba de presenti* constituted a marriage? In the case supposed the second marriage was good and indissoluble, and if the argument for \*the Crown be correct,

[ \*889 ]

so would the marriage alleged to be constituted by the contract; but as both marriages could not possibly be good at the same time, it follows that the contract did not constitute a marriage. This passage from Lord Coke is consistent with the note of Lord Hale, 33 a; whereas if the proposition in that note be erroneous, Lord Coke was also in error. For if the contract constituted a marriage,

(1) 860 G. pl. 1.  
(2) 33 a.

(3) S. 17.  
(4) 2 Str. 937.

REG.  
v.  
MILLIS.

the second marriage would have been void and not voidable, which it clearly was not. The case before quoted from Rolfe's Abridgment, 360 G. placitum 1, proves the same thing. It says, a divorce *causa præcontractus* bastardises the issue. They were not bastards till the sentence, and would never become so if there should be no sentence. The second marriage was therefore voidable, but not void.

We have therefore the authority of Lord Coke, that after a contract *per verba de presenti*, and a subsequent marriage by one of the parties with another person, and a death which prevented the second marriage from being avoided, the wife of such second marriage was entitled to dower; but if the woman party to the contract became very wife, why is she not also to have dower? Issue of the second marriage are legitimate; but if the contract constituted a marriage, so also must be the issue born to the parties to it; that is, there must have been two valid marriages conferring such rights, subsisting at the same time, which is impossible. The authorities prove that such second marriage was not void, but conferred such rights; the contract therefore did not; that is, it was not a marriage.

In *Bunting v. Lepingwell* (1), before referred to, no \*question was made as to whether the second marriage was void or not, but it was assumed not to be void; and the question was, whether it had been effectually avoided. If the contract had been considered as constituting marriage, the issue would have been legitimate without reference to the subsequent conduct of the parents. The second marriage was treated as voidable, but not void; and the grounds upon which the legitimacy was contended for, and apparently established, negatived the supposition that the contract *per verba de presenti* constituted a valid marriage.

[ \*890 ]

The Act 32 Hen. VIII. c. 38, which prohibited divorces upon pretence of a former contract, and the Act 2 & 3 Edw. VI. c. 23, which repealed that Act, and restored the jurisdiction of the Ecclesiastical Courts in such cases, prove the same thing.

In England the Marriage Act, 26 Geo. II. c. 33, at the same time prescribed the form of future marriages and abolished all suit to enforce contracts, and thereby by implication abolished divorces *causa præcontractus*; the conflict, therefore, between a contract *per verba de presenti*, and a subsequent marriage, could not arise. But in Ireland, the 58 Geo. III. c. 81, s. 3, in the same manner

(1) 4 Co. Rep. 29; Moor, 169.

REG.  
v.  
MILLIS.

prohibited all future suits to compel a celebration of marriage *in facie ecclesie* by reason of any contract, whether *per verba de presenti* or *per verba de futuro*. In Ireland, therefore, a marriage after a contract *per verba de presenti* with another, cannot be the subject of a suit in the Ecclesiastical Court; the second marriage therefore cannot be disturbed by it, but such second marriage it has been proved was good till set aside, and is therefore now indissoluble. If, therefore, the contract constituted a marriage, there are two marriages, both indissoluble, subsisting at the same time, which is impossible.

[ 891 ]

These authorities appear to me to establish the five propositions, and there is no balance of authority; for not one single case has been produced tending to negative or to throw doubt upon any one of them, except a passage from Perkins as to the effect of a feoffment after a contract, but which is opposed to decided cases. There are, however, others in which, although the point was not directly raised, the proposition is assumed that contract *per verba de presenti* did not constitute a marriage.

In *Weld v. Chamberlayne* (1), and *Reg. v. Fielding* (2), there were contracts *per verba de presenti*; but Chief Justice PEMBERTON in the one, and Mr. Justice POWELL in the other, did not upon that ground treat the marriages as established, but both marriages were made to depend upon the quality of the minister who officiated.

In *Paine's* case (3), if the contract had the effect of a marriage, how could the question have arisen whether the man and woman were husband and wife from the sentence of the Ecclesiastical Court, or from the ceremony, as was the opinion of Mr. Justice TWISDEN? If it had been considered as law that a contract *per verba de presenti* constituted marriage, it is strange that no allusion should be found to it in the earlier Acts of Parliament referred to by the CHIEF JUSTICE; and the whole frame of the Marriage Act, 26 Geo. II. c. 33, seems inconsistent with the supposition. If contracts *per verba de presenti* and *per verba de futuro subsequente copulâ* had been considered to constitute valid marriages, can it be supposed that no allusion would have been made to this mode of contracting marriage, in an Act the object of \*which was to prevent clandestine marriages? The Act provides that there should not be any suit or proceeding in any Ecclesiastical Court, made to compel the celebration of any marriage *in facie ecclesie* by reason of any contract of

[ \*892 ]

(1) 2 Show. 300.

(2) 14 St. Tr. 1327.

(3) 1 Sid. 13.

matrimony whatsoever, whether *per verba de presenti* or *per verba de futuro*, which should be entered into after the 25th of March, 1754; but it does not declare that marriages by contract *per verba de presenti* or *per verba de futuro subsequente copulâ* should be void for the future. By section 8, it makes null and void all marriages solemnised by any persons, except in the manner prescribed, but takes no notice of marriages arising from contract without solemnisation, except in section 13, by prohibiting suits to compel celebration of marriage by reason of such contracts; a provision very natural if the contract were considered as inoperative till enforced, but not consistent with the notion of the contract itself constituting marriage. So that the Act does not in terms abolish divorces *causâ præcontractûs*, but is supposed to have that effect by implication from the prohibition to enforce the contract. This is observed in a note to Coke upon Littleton, 79 b.

REG.  
F.  
MILLIS.

I have now, I believe, observed upon all the cases having any material bearing upon the present question, which have been produced, of a date anterior to the Marriage Act of the 26 Geo. II. c. 33, 1753; except the two important ones before Lord Holt, *Collins v. Jessot* (1), and *Wigmore's case* (2). The first is reported in Salkeld, Modern, and Holt; the other only in Salkeld and Holt; and the reports require to be compared together, in order that the points decided may be fully understood.

*Collins v. Jessot* was an application for a prohibition, upon the ground that the Ecclesiastical Court was proceeding upon a marriage contract *per verba de futuro*, for the breach of which the parties had a remedy at common law. It was refused, upon the ground that the Ecclesiastical Court had jurisdiction over marriage contracts, whether *per verba de futuro* or *per verba de presenti*. The jurisdiction of the Ecclesiastical Court was the only matter in question, in discussing the difference between the two contracts. Lord Holt's observations must be supposed to have reference to the subject-matter under consideration; namely, the principle upon which the ecclesiastical law proceeded in drawing a distinction between the two contracts. He particularly adverted to the contract *per verba de presenti* not being releasable between the parties, whereas the contract *per verba de futuro* was releasable; and he observed that, till released, the party had an option to proceed in the Ecclesiastical or Common Law Courts. This being the question before the Court,

[ 893 ]

(1) 2 Salk. 437; 6 Mod. 155; Holt, 459.  
(2) 2 Salk. 438; Holt, 459.

REG.  
r.  
MILLIS.

and this the reasoning he was pursuing, the expressions so much relied upon were used: "If a contract be *per verba de præsenti*, it amounts to an actual marriage, which the very parties themselves cannot dissolve by release or other mutual agreement, for it is as much a marriage in the sight of God as if it had been *in facie ecclesiæ*; with this difference, that if they cohabit before marriage *in facie ecclesiæ*, they are for that punishable by ecclesiastical censures, and if after such contract either of them lie with another, they will punish such offender as an adulterer."

[ \*894 ]

*Wigmore's* case is best reported in Holt, 459. This case also was an application for a prohibition against a suit in the Ecclesiastical Court for alimony; the \*ground being that there had been no marriage, the man being a Dissenter, and the marriage having been by a minister of the congregation not in orders. The result is not stated, but it is obvious that the question must have been as to the jurisdiction of the Ecclesiastical Court. The words attributed to Lord Holt are, "by the canon law, a contract *per verba de præsenti*; as, I take you to be my wife; I marry you; or, You and I are man and wife; is a marriage: so of a contract *per verba de futuro*; I will take you to be my wife; or, I will marry you; if the contract be executed, and he does take her, it is a marriage, and the Spiritual Court cannot punish for fornication:" (not very consistent with what is laid down in *Collins v. Jessot*, that after a contract *per verba de præsenti*, and before marriage, cohabitation was punishable). "In the case of a Dissenter married to a woman by a minister of the congregation who was not in orders, it is said that that marriage was not a nullity, because by the law of nature the contract is binding and sufficient, for though the positive law of man ordains that marriage shall be made by a priest, the law only makes this marriage irregular, and not expressly void; but marriages ought to be solemnised according to the rites of the Church of England, to entitle to the privileges attending legal marriages, as dower, thirds, &c."

[ \*895. ]

In endeavouring to ascertain the meaning of the expressions used by Lord Holt, the reports of these two cases must be taken together, as they relate to the same matter. In *Wigmore's* case, Lord Holt tells us that in saying that a contract *per verba de præsenti* was a marriage, he is speaking of the canon law. Now, if the common law were the same, why specify "by the canon law?" Again, he seems to recapitulate the \*arguments urged in support of the validity of a marriage by a dissenting minister; "it is said,"

&c. But what is his answer to these arguments? "But marriages ought to be solemnised according to the rites of the Church of England, to entitle to the privileges attending legal marriage, dower, thirds, &c." It may be doubtful how far Lord Holt may be supposed to assent to the proposition which follows the words "it is said;" but beyond all doubt the concluding words above quoted contained the expression of his own opinion; and that is, that for a marriage to be legal, and to give the rights of marriage, such as dower, thirds, &c., it must be solemnised according to the rites of the Church of England. If such were the opinion of Lord Holt in the 5th of Anne, can it be supposed that he, in *Collins v. Jessot*, in the 2nd of Anne, entertained and expressed an opinion directly the contrary? Is it not rather to be assumed that when, in *Collins v. Jessot*, he speaks of a marriage contract *per verba de presenti* amounting to an actual marriage, he means what in *Wigmore's* case he expresses, that it is so by the canon law? But let the words be considered as they stand. He is showing the difference between contracts *per verba de presenti* and *de futuro*; and he says the former amount to an actual marriage, which the parties themselves cannot dissolve by release, whereas they can release the latter sort of contract. To this extent and for this purpose the former is a marriage. When he says that it is as much a marriage in the sight of God as if it had been *in facie ecclesie*, does he not mean to draw the distinction between a marriage in the sight of God, and for other or civil purposes; or could he mean to be understood to say that such marriages were good in \*the sight both of God and man? In *Wigmore's* case he tells us the contrary.

REG.  
r.  
MILLIS.

[ \*896 ]

I cannot, therefore, consider Lord Holt as an authority against the judgment under review; but, on the contrary, I consider the concluding sentence in *Wigmore's* case (as to the meaning of which there is no ambiguity and can be no doubt) as consistent with and confirmatory of the many cases before cited; which prove, that from the earliest time of which we have any record, down to the passing of the Marriage Act in 1753, no marriage celebrated without the intervention of a person in holy orders, was valid for the purpose of conferring civil rights or imposing civil liabilities; for that is the real question: and consistently with the conclusions upon this subject, to which all the cases lead, a contract *per verba de presenti* may, in the language of civilians and canonists, and even of the common law, be said to be *ipsum matrimonium*; for if,

REG.  
v.  
MILLIS.

supposed that by the law of this country, before the Marriage Act, a contract *per verba de presenti* constituted a valid marriage. He says, "There is then in this state of the parties more than the mere contract *per verba de presenti* in the Christian Church, which was a perfect contract of marriage, though public celebration was afterwards required by the rules and ordinances of the canon law." Lord STOWELL, therefore, found a contract *per verba de presenti*, but held that it did not constitute a marriage.

[ \*900 ]

I cannot leave this case without referring to the test which Sir WILLIAM WYNNE uses to try the validity of the ceremony, which is directly applicable to this case. "The question," he says, "is, whether the woman is the wife of Belisario. I think it clear from the evidence, that she is not. The ceremony which \*has passed, although it prevents her from marrying any other man until a divorce is given, does not give him any authority over her person or property. A man cannot be the husband of a woman without having the civil rights; which he has not. And again, can she be his wife, when it is proved that he has not a right to a penny of her fortune, and that she has a right to dispose of it, and that if she were to die he would have no right at all?"

In *Goldsmid v. Bromer* (1), Lord STOWELL says, "The parties are both Jews, and both appeal to the Jewish law, by which this question must be decided. The Jews, though British subjects, have the enjoyment of their own laws in religious ceremonies, and the Marriage Act acknowledges this privilege, by excepting them out of its provisions. To deny them the benefit of their own law upon such subjects, would be to deny to a distinct body of people the full benefit of the toleration to which they have long been held to be entitled."

These cases prove that the marriages of Jews have been supported upon grounds wholly inapplicable to the present case. It was assumed that the validity of these marriages would be determined by their own laws and usages, and not by the laws and usages of this country; and Lord STOWELL puts the marriages of Quakers upon the same footing, for in *Jones v. Robinson* (2) he says, "The general law of the Marriage Act makes the marriage by licence of minors, without consent, null. This clause is restrained as to its effects where the parties are Quakers or Jews; that is, where they are both so; they having rights of marriage of their own."

It is to be regretted that with respect to the marriages \*of Quakers, we have not the benefit of that investigation which marriages of Jews have received in the case of *Lindo v. Belisario*. If indeed there had been any decision in favour of those marriages, upon the ground that by the law of England contracts *per verba de presenti* before the Marriage Act constituted a valid marriage, such decisions would have been directly in point, and would require to be weighed against the other decided cases in which the contrary appears to have been held; and had such marriages been capable of being supported upon that ground, no doubt could have existed as to their validity. But we find, in *Hutchinson and wife v. Brookebanke* (1), Quakers, after a regular marriage according to their forms, prosecuted in the Ecclesiastical Court for fornication, and a prohibition granted upon the question whether they were not protected by the Toleration Act of 1 & 2 W. & M. c. 18; and when the legality of Quaker marriages came before Lord Manners in *Houghton v. Houghton* (2), anxious, as he evidently was, that no doubt should be entertained of the legality of those marriages, he rested it entirely upon the construction of certain Acts to which he referred, and did not allude to the supposed common-law foundation for them.

REG.  
v.  
MILLIS.  
[ \*901 ]

In the case before Lord Hale, in which a special verdict was found upon the validity of a Quaker marriage, the course he adopted, and the expressions used by him, show the difficulty he had in supporting the validity of the marriage, and at the same time the strong desire he felt to do so. But it also appears from this case, that it did not occur to him that they could be supported upon the mere proof of a contract \**per verba de presenti* or *de futuro cum copulâ*, which must have been in evidence; for he is reported to have said, that he thought that all marriages made according to the principles of men severally, should be held good and receive their effect in law; a rule very much resembling that acted upon by Sir WILLIAM WYNNE and Lord STOWELL in *Lindo v. Belisario*, but very far removed from the principle that the mere contract would operate as a marriage; because, as the contract must be a part of all marriages, there could not, in giving to the contract the effect of marriage, be any question of considering the principles of the parties to it; and in *Jones v. Robinson*, before cited, Lord STOWELL says, Jews and Quakers have rights of marriage of their own.

[ \*902 ]

It is impossible, however, not to feel the importance of the fact

(1) 3 Lev. 376.

(2) 1 Moll. 611.



REG.  
F.  
MILLIS.

that such marriages have been recognised in several cases. I have felt it to be very difficult to be explained, consistently with the judgment below; but as I do not find these marriages established upon the ground that the contract was sufficient without the intervention of a person in holy orders, but, on the contrary, find their validity referred to other grounds peculiar to them, and observe the terms used with respect to these marriages in the Acts from the operation of which they are excluded, I cannot think the argument arising from them sufficient to affect the many authorities to which I have referred.

[ \*903 ] Lord ELLENBOROUGH is supposed, in *Rex v. Inhabitants of Brampton* (1), to have expressed an opinion in favour of the validity of a marriage *per verba de presenti*, without the intervention of a person in holy orders. I do not so understand that case, \*nor was that point in question, for the ceremony was performed by a person apparently a clergyman. If he had supposed the intervention of a priest unnecessary, for what purpose did he discuss the result of the evidence of the person who officiated being in orders; or refer to *Rex v. Fielding* (2), to prove that a marriage by a Roman Catholic priest, before the Marriage Act, was effectual for the purpose of making the marriage valid?

The opinion of Lord STOWELL in *Dalrymple v. Dalrymple* (3), has, I think, been supposed to be much more decisive in favour of the validity, as a marriage, of a mere contract *per verba de presenti*, than, upon a careful examination of what he there says, it appears to be. He says that the law of England retained such rules of the canon law as had their foundation, not in the sacrament, or in any religious view of the subject, but in the natural and civil contract of marriage; and that the Ecclesiastical Courts enforced those rules, and, amongst others, the rule which held an irregular marriage, constituted *per verba de presenti*, not followed by any consummation, valid to the full extent of avoiding a subsequent regular marriage contracted with another person. The same doctrine, he says, was recognised by the Temporal Courts; and, after referring to *Bunting's* case, adds, "Though the common law certainly had scruples in applying the civil rights of dower, community of goods, and legitimacy, in the case of these looser species of marriage." There is, however, no doubt but that his high authority is properly urged against the judgment.

(1) 10 R. R. 299 (10 East, 282).

(2) 14 Sta. Tr. 1327.

(3) 2 Hagg. Cons. Rep. 54.

In *Lautour v. Teesdale* (1), Sir VICARY GIBBS, professing to take the law from *Dalrymple v. Dalrymple*, \*certainly seems to assume that a contract *per verba de presenti*, without more, would, before the Marriage Act, have constituted a valid marriage; but there was no such question in the case before him; the case reserved at the time, upon which the opinion of the Court was given, having stated that the ceremony was performed by a Roman Catholic priest, which had been held sufficient.

REG.  
v.  
MILLIS.  
[ \*904 ]

I do not think it necessary to advert to all the modern cases in which eminent Judges have expressed opinions favourable to the proposition contended for on behalf of the Crown. Ever since the case of *Dalrymple v. Dalrymple*, there has naturally been a prevailing opinion consistent with what was supposed to be the doctrine of so great an authority as Lord STOWELL. The question in these cases was not the subject of investigation and argument, such as we have had the benefit of in this case; and the opinions so expressed were rather assents to the doctrine so laid down, from the deference to the authority from which it proceeded, than from any judgment exercised as to the grounds upon which it was founded. Those grounds have now been examined; and if Lord STOWELL really entertained the opinion which has been attributed to him, it will afford a strong instance of the difference of weight which ought to be attributed to an opinion essential to the support of the judgment pronounced, and one advanced by way of illustration or argument; for as such only could the state of the English law before the Marriage Act have been pertinent to the question before him. If, upon examining the grounds of the opinion so expressed, notwithstanding the extent to which it has been adopted by other Judges and by the profession of the law at large, it shall be found that it is contrary to the law as established by \*formal

[ \*905 ]

(1) 17 R. R. 518 (8 Taunt. 830; 2 Marsh. 243).

REG.  
v.  
MILLIS.

[ \*906 ]

I cannot hold the affirmative of this proposition because many eminent Judges have expressed opinions in favour of that conclusion, when I find, from the time of the Saxons to the passing of the Marriage Act in 1753, a succession of authorities and decisions against it, without one in its favour. And it must be observed, that notwithstanding the opinions so expressed, there has been a course of dealing with the subject very inconsistent with the state of the law as assumed in those opinions. We hear of actions by women for breach of promise of marriage after a contract *de futuro* and cohabitation; that is, an action by a wife against her husband for a breach of a promise to marry, the marriage being by the supposition complete. It is difficult to conceive how in such case there could be a contract to support the action, which would not, with the cohabitation, be a marriage according to the supposed law. Then there are Acts relating to Quakers, in which their marriages are called pretended marriages; and many respecting marriages of Dissenters, and of persons in the colonies, which would be wholly useless if a contract could \*constitute a marriage. It is true that many of these Acts are declaratory; but as they were intended to confirm past marriages as well as to establish regulations for future ones, that form was very naturally adopted. I do not observe upon these Acts in detail. They have been commented upon by the LORD CHIEF JUSTICE, in giving the opinion of the Judges. They do not, indeed, prove that a mere contract could not have the effect of a marriage, but they certainly show a state of uncertainty not consistent with the unhesitating opinions which have fallen from some Judges in the later cases.

It was urged that marriages were good where the person officiating was not in orders, though pretending and believed to be so. This, I apprehend, depends upon a very different principle. The Court in such a case would not, I conceive, permit the title to orders to be inquired into.

If I am right, that by the law of England the intervention of a person in holy orders was necessary to constitute a binding marriage, there is not, I think, any difficulty in coming to the conclusion that such person must be in orders recognised by the Church of England. The necessity of such intervention, if it exists, must have arisen from regulations of the Church, in whose Courts all questions of marriage were decided; and when the Church speaks of persons in holy orders, those only can be intended whom the Church conceives to be clothed with that

character, in which number members of the Presbyterian Church are not included.

REG.  
v.  
MILLIS.

I have now concluded what it appeared to me to be proper to address to the House upon this most difficult and important case. I have with great reluctance found myself compelled to adopt the opinion I have \*expressed. I am aware of the difficulties and hardships to which affirming the judgment may lead. Happily it will be within the power of the Legislature to remove those difficulties, and to avert those hardships (1). We have here but one duty to perform, to declare what we believe to be the law; and in the performance of that duty I am bound to declare, that in my opinion the first marriage in this case was not a valid marriage in law; and therefore that the party was not legally guilty of the offence with which he was charged, and that the judgment ought to be for the defendant in error.

[ \*907 ]

“It was ordered and adjudged by the Lords, that the judgment given in the said Court of Queen’s Bench be, and the same is hereby affirmed. And that the record be remitted, to the end such proceedings may be had thereupon as if no such writ of error had been brought into this House.”—Lords Journals, 29th March, 1844.

In the case of *Reg. v. Carroll*, the Order of the House states that, “regard being had to the judgment,” in *Reg. v. Millis*, the judgment of the Court of Queen’s Bench was affirmed.

The entry on the Minutes of Proceedings of the 29th March is in this case more full than the entry on the Journals, and is in the following form: “*Reg. v. Millis* (Writ of Error). The order of the day being read for the further consideration of this case, the House proceeded to take the same into consideration. And it being moved to reverse the judgment complained of, the same was objected to, and the question was put whether the judgment complained of shall be reversed? The Lords COTTENHAM and CAMPBELL were appointed to tell the number of votes; and, upon report thereof to the House, it appeared that the votes were equal;

(1) An Act has since been passed (7 & 8 Vict. c. 81), intitled “An Act for Marriages in Ireland, and for registering such Marriages;” by the fourth section of which, marriages between parties, one or both of whom are Presbyterians, may be solemnised in certified Presbyterian meeting-houses.

The 5 & 6 Vict. c. 113, the 6 & 7 Vict. c. 39, and the 83rd section of the 7 & 8 Vict. c. 81, severally confirm marriages celebrated by Protestant dissenting ministers in Ireland, up to the time of passing the last-named statute.

REG.  
r.  
MILLIS.

that is, two for reversing and two for affirming. Whereupon, according to the ancient rule in the law, *Semper præsimitur pro negante*, it was determined in the negative. Therefore the judgment of the Court below was affirmed, and the record remitted."

1844,  
June 4, 7.

[ 908 ]

## THE IRONMONGERS' COMPANY v. THE ATTORNEY-GENERAL.

(10 Clark & Finnelly, 908—933.)

Charity—Failure of object—Substitute—*Cy-près*.

[THIS was an appeal from a decision by Lord COTTENHAM, L. C. (reported in Cr. & Ph. 219), reversing a previous decision of the MASTER OF THE ROLLS (reported in 2 Beav. 919) as to the application *cy-près* of certain funds under a reference directed by Lord BROUGHAM; see 39 R. R. 302 (2 My. & K. 576). Lord COTTENHAM's decision was affirmed by the House of Lords on this appeal, a note of which will be found in 54 R. R. at p. 276, at the end of the report of that decision.—O. A. S.]

1844,  
June 14.

Lord  
COTTENHAM.

Lord  
CAMPBELL.

[ 934 ]

## EDWARD RAILTON v. THOMAS GADD MATHEWS AND ROBERT LEONARD AND ANOTHER (1).

(10 Clark & Finnelly, 934—945.)

Surety—Undue concealment—Direction to a jury.

A party became surety in a bond for the fidelity of a commission agent to his employers. After some time the employers discovered irregularities in the agent's accounts, and put the bond in suit. The surety then instituted a suit to avoid the bond, on the ground of concealment by the employers of material circumstances affecting the agent's credit prior to the date of the bond, and which, if communicated to the surety, would have prevented him from undertaking the obligation. On the trial of an issue whether the surety was induced to sign the bond by undue concealment or deception on the part of the employers, the presiding Judge directed the jury, that the concealment, to be undue, must be wilful and intentional, with a view to the advantages the employers were thereby to gain :

Held by the Lords (reversing the judgment of the Court of Session) that the direction was wrong in point of law.

Mere non-communication of circumstances affecting the situation of the

(1) Cited in *Phillips v. Fozzall* (1872) L. J. Q. B. 246; and cp. *Seaton v. L. R. 7 Q. B. 666, 672, 41 L. J. Q. B. 293*; *Mayor of Durham v. Fowler* (1889) 22 Q. B. D. 394, 404, 421, 58 L. J. Q. B. 135; 69 L. J. Q. B. 409; 82 L. T. 205.

parties, material for the surety to be acquainted with, and within the knowledge of the person obtaining a surety bond, is undue concealment, though not wilful or intentional, or with a view to any advantage to himself.

RAILTON  
v.  
MATHEWS.

THE respondents, Mathews and Leonard, carried on business in partnership at Bristol: their business extended to Scotland, and was conducted by their agents in Glasgow. Messrs. Rowley and Hickes acted as such agents from January, 1832, to February, 1834, when they dissolved partnership, and it became necessary for the respondents to make a new appointment of agency. Hickes and Rowley then severally applied for the appointment. The respondents gave it to Hickes. The appointment was by letter, dated Bristol, 25th January, 1834, in these terms: "SIR,—We appoint you as our agent for the sale of dye wares, and to collect all our monies; you finding us security for 3,000*l.*, as proposed."

Hickes, upon being so appointed, entered upon the agency, or rather continued the agency held before by him and Rowley. Being afterwards required by the respondents to find the security, he proposed his brother, who resided in England, and the appellant, who was a writer in Glasgow. The respondents agreed to accept the proposed sureties without any communication with either of them; and the necessary bond having been prepared and transmitted to the agent, was subscribed by him and by the appellant at Glasgow in September, and by the other surety in October, 1835. The bond was in the English form, and in the penal sum of 4,000*l.*, conditioned that the agent should faithfully conduct himself as the clerk and commission agent of the respondents, and satisfactorily account to them for all monies received on their account.

[ 935 ]

In May, 1837, the respondents discovered that Hickes had acted unfaithfully in the agency, and had contrived to apply their monies to his own use to a large amount. They gave notice of this discovery to the sureties; and subsequently, by the third respondent, their mandatory in Scotland, raised an action against all the obligors in the bond, concluding for count and reckoning of the whole of the agent's actings, and for payment of the 4,000*l.*, or such part thereof as might be found to be due by the agent.

The appellant alone defended the action; but before any final judgment was pronounced, he raised an action against the respondents for reduction of the bond, upon various grounds, principally on this: "that the bond was obtained fraudulently by the

RAILTON  
v.  
MATHEWS.  
[ \*936 ]

respondents, and on the procurement thereof they were guilty of a fraudulent concealment of material circumstances known to them, and deeply affecting \*the credit and trustworthiness of the said Hickes." The libel then, after stating various circumstances importing the respondents' knowledge of Hickes' misconduct and irregularities in the agency during the period of his partnership with Rowley, summed up the whole statement to this effect: That although at and prior to the time of receiving the bond, the respondents had been made acquainted with the misconduct of Hickes in misapplying the funds of the firm of Rowley and Hickes to his own private purposes; and although, from their own experience of his gross irregularities under the agency, they were perfectly aware that he was unworthy of trust, they totally failed to communicate (to the sureties) the said circumstances or either of them, or the existence of any balance on the agency accounts then standing against Hickes; on the contrary, while they accepted and took possession of the bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of Hickes, and the state of his accounts, which circumstances were wholly unknown to the appellant and the respondents, by their whole conduct in the premises, deceived and misled the appellant into the belief that Hickes was in every respect trustworthy, while they well knew the reverse; whereby the bond was obtained by them through fraud and deceit, and the undue concealment of material facts, which they knew, if communicated, would have prevented the appellant from undertaking the said obligation or subscribing the bond; or the respondents were guilty of fraudulent concealment of material circumstances in obtaining the bond, and the same was therefore null and void.

[ \*937 ]

The two actions were afterwards conjoined, and \*issues were directed: the first issue, which was in the appellant's action and was first tried, being, "Whether the pursuer, E. Railton, was induced to subscribe the bond by undue concealment or deception on the part of the defenders, or either of them?"

The LORD JUSTICE CLERK, who presided at the trial, in the course of his charge to the jury, directed them that under this issue, "the concealment must be, first, of things known to the defenders, or which they had strong and grave ground to suspect; secondly, that the concealment therefore being undue, must be wilful and intentional, with a view to the advantage they were thereby to receive."

The jury found a verdict in favour of the respondents, and, in

effect, sustaining the bond; whereupon the appellant's counsel took an exception to the learned Judge's direction to the jury.

RAILTON  
c.  
MATHEWS.

The bill of exceptions was argued before the Lords of the Second Division, who, by an interlocutor of the 31st of January, 1844, disallowed the same (1), and refused to grant a new trial, and appointed judgment to be entered up on the verdict.

The appeal was against the interlocutor.

*Mr. Serjeant Talfourd* and *Mr. Fleming*, for the appellant, after stating the evidence as set forth in the bill of exceptions, said it showed clearly that the respondents, before they took the bond of caution, were well aware of the agent's misconduct in the agency while he was in partnership with Rowley, but they did not disclose the facts to the proposed sureties. The respondents also knew that after Hickee \*became sole agent to them he was irregular in his accounts, and they frequently remonstrated with him by letter, but did not make any communication of those irregularities to the sureties, who had no reason to suppose that the agent was not perfectly trustworthy. The respondents' concealment or non-communication of those irregularities, whether they were influenced by any advantage to themselves or not, was an undue concealment, and relieved the sureties from their obligation; and, therefore, the learned Judge's charge to the jury was wrong in law: *Montague v. Tidcombe* (2), *Shepherd v. Beecher* (3), *Rees v. Berrington* (4), *Smith v. The Bank of Scotland* (5), *Duncan v. Porterfield* (6), *Muir v. Hardie* (7), *Dalzell v. Menzies* (8), *Thompson v. The Bank of Scotland* (9). Assimilating suretyship to policies of insurance, as to the necessity of disclosing all material circumstances to the underwriter, they referred to *Carter v. Boehm* (10), and to the first volume of *Park on Insurance*, p. 408 *et seq.*

[ \*938 ]

*Mr. F. Kelly* and *Mr. Anderson*, for the respondents, submitted, that as the respondents did not believe that the charge made by Rowley against Hickee affected his trustworthiness, it was not material to communicate it to the sureties. They denied that there was any similarity between this case and cases of insurance. They

(1) 6 Bell, Murray, Young & 7 Sh. & Dunl. 244.

Tennant, pp. 540 to 565; *S. C.* 16 (6) 5 Sh. & D. 111.

Dunbar, Beveridge & Fordyce, 252. (7) 8 Sh. & D. 346.

(2) 2 Vern. 518. (8) 9 Sh. & D. 434.

(3) 2 P. Wms. 288. (9) 2 Shaw's App. Cas. 316.

(4) 3 B. R. 3 (2 Ves. Jun. 540). (10) 3 Burr. 1905.

(5) 14 B. R. 67 (1 Dow, 272); *S. C.*



RAILTON  
 v.  
 MATHEWS.  
 [ \*939 ]

relied upon the able exposition of the law on the subject, as given in the judicial speeches in the Court below (1), and also on \*the observations of Lord BROUGHAM, in *M'Taggart v. Watson* (2), in this House.

LORD COTTENHAM :

Entertaining an opinion against the judgment pronounced in the Court below, if I had felt any doubt upon the subject, or had considered it a case which required more investigation of the facts than it has received, I certainly should have been unwilling to dispose of it without taking time for further consideration ; but the facts are so simple, and the points are so free from doubt, that I see no reason why the House should not at once dispose of the case.

The real question is, whether the way in which the learned Judge put this case to the jury, and described to them the duty they had to perform, was or was not consistent with and properly applicable to the issue raised for their consideration. The issue, in my opinion, very clearly describes the point which the Court wished to have investigated. The terms of the issue must, of course, be construed as they stand ; but it is not immaterial to look to the points raised in the pleadings, for the purpose of construction. If there were any doubt upon the meaning of the terms used, I would look to the summons for reduction of the instrument of suretyship ; and I find several facts appearing, as having passed between the party who was the subject of the suretyship, and those by whom he had been previously employed ; and I find the matter stated in these terms : " That the parties totally failed to communicate the said circumstances or either of them, or the existence of any balance on the agency accounts then standing against the said \*George Hickes, to the pursuer or to the said Henry William Hickes ; and on the contrary, while they accepted and took possession of the said bond, they fraudulently suppressed and concealed the said whole facts and circumstances regarding the conduct and irregularities of the said George Hickes," &c.

[ \*940 ]

There is an imputation made of direct fraud, a fraudulent intention influencing the acts of the parties, and there is a direct statement of such concealment.

It has not been contended, and it is impossible to contend, after what Lord ELDON lays down in the case of *Smith v. The Bank of*

(1) 6 Bell, M. Y. & T. 540 ; S. C. 16 D. B. & F. 252,

(2) 3 Cl. & Fin. 536 ; S. C. 1 Sh. & Maclean, 553,

*Scotland* (1), that a case may not exist in which a mere non-communication would invalidate a bond of suretyship. Lord ELDON states various cases in which a party about to become surety would have a right to have communicated to him circumstances within the knowledge of the party acquiring the bond; and he states that it is the duty of the party acquiring the bond to communicate those circumstances, and that the non-communication, or, as he uses the expression, the concealment of those facts, would invalidate the obligation and release the surety from the obligation into which he had entered.

RAILTON  
v.  
MATHEWS.

Now, when the issue in this case was tried, such being the points raised between the parties, we have nothing to do with the evidence in the cause, or the facts proved, or the conclusion to which the jury might or might not have come under the circumstances, but with the question whether the charge which was made to them was such a charge as we conceive ought to have been made to them. The issue for their consideration was, as a matter of fact, \**“whether the pursuer, Edward Railton, was induced to subscribe the bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them;”* raising these two propositions which were raised in the pleadings in the cause, either of which, if found in the affirmative, would lead to the conclusion of the cause.

[ \*941 ]

The question,—looking at the terms in which the matter was left to the jury, and the mode in which the learned Judge informed the jury they ought to perform their duty,—is whether there may not have been a case brought before the jury for their consideration of improper and undue concealment (which I understand to mean a non-communication of facts which ought to have been communicated), which would lead to the relief of the surety, although the non-communication might not be wilful and intentional, and with a view to the advantage which the party was thereby to receive. That which I find here extracted from the charge of the learned Judge, I understand to be one proposition. The learned Judge lays it down distinctly that the concealment, to be undue, must be wilful and intentional, with a view to the advantage they were thereby to receive. In my opinion there may be a case of improper concealment or non-communication of facts which ought to be communicated, which would affect the situation of the parties,

(1) 14 B. R. 67 (1 Dow, 272; see p. 292 *et seq.*); S. C. 7 Shaw & Dunl. 244, 248.

RAILTON  
v.  
MATHEWS.

even if it was not wilful and intentional, and with a view to the advantage the parties were to receive. The charge, therefore, I conceive, was not consistent with the rule of law; I think that it narrowed the question for the consideration of the jury beyond the limits which the rights of the parties required to have submitted to the consideration of the jury.

[ 942 ]      Without going further into the law which regulates the rights of these parties than that which was stated by Lord ELTON in *Smith v. The Bank of Scotland*, we find that in a judgment of this House in the case of an appeal from Scotland, and therefore one peculiarly valuable in the case now under consideration, that has been declared to be the law. The terms used by the learned Judge in directing the jury having limited the question for their consideration much more than the rule of law would justify, it appears to be quite clear that this case has not been properly tried, that the exceptions were properly taken, and that this House is bound to pronounce such a judgment as ought to have been pronounced by the Court of Session.

LORD CAMPBELL:

This case has been very satisfactorily argued on both sides; with great brevity, but everything has been urged which could be for the advantage of the clients or the assistance of your Lordships; and having listened to all which has been urged on both sides very attentively, I, without the smallest hesitation, come to the conclusion that the bill of exceptions ought to be allowed, and that there must be a new trial.

The question really is, what is the issue which the Court directed in this case? "Whether the pursuer, Edward Railton, was induced to subscribe the said bond of caution or surety by undue concealment or deception on the part of the defenders, or either of them?" The material words are, "undue concealment on the part of the defenders." What is the meaning of those words? I apprehend the meaning of those words is, whether Railton was induced to subscribe the bond by the defenders having omitted \*to divulge facts within their knowledge which they were bound in point of law to divulge. If there were facts within their knowledge which they were bound in point of law to divulge, and which they did not divulge, the surety is not bound by the bond: there are plenty of decisions to that effect, both in the law of Scotland and in the law of England. If the defenders had facts within their knowledge which it was material the surety should be acquainted with, and

[ \*943 ]

RAILTON  
\*  
MATHEWS.

which the defenders did not disclose, in my opinion the concealment of those facts, the undue concealment of those facts, discharges the surety; and whether they concealed those facts from one motive or another, I apprehend is wholly immaterial. It certainly is wholly immaterial to the interest of the surety, because, to say that his obligations shall depend upon that which was passing in the mind of the party requiring the bond, appears to me preposterous; for that would make the obligation of the surety depend on whether the other party had a good memory, or whether he was a person of good sense, or whether he had the motive in his mind, or whether he was aware that those facts ought to be disclosed. The liability of a surety must depend upon the situation in which he is placed, upon the knowledge which is communicated to him of the facts of the case, and not upon what was passing in the mind of the other party, or the motive of the other party. If the facts were such as ought to have been communicated, if it was material to the surety that they should be communicated, the motive for withholding them, I apprehend, is wholly immaterial. Then we come to the direction given by the learned Judge. He says, "The concealment, therefore, being undue, must be wilful and intentional, with a view" \* (and that is with reference to the motive) "to the advantage they were thereby to receive." Now, according to my notion of the issue, that is an entire misconception of it: according to this direction, although the parties acquiring the bond had been aware of the most material facts which it was their duty to disclose, and the withholding of which would avoid the bond, if they did not wilfully and intentionally withhold them, that is to say, if they had forgotten them, or if they thought by mistake that in point of law or morality they were not bound to disclose them, then, according to the holding of the learned Judge, it would not be a concealment. But the learned Judge does not stop there; he goes on, "with a view to the advantage they were thereby to receive;" introducing those words conjunctively, and, in effect, saying that it was not an undue concealment unless they had their own particular advantage in view. That appears to me a misconception. I will suppose that their motive was kindness to Hiekes; to keep back from those who, it was material to him, should continue to have a good opinion of him, the knowledge of those facts; that it was a pure kindness on their part, to prevent those parties entertaining a bad opinion of him, and not from any selfishness, this concealment took place. Although that might be the motive, yet the fact that he was in arrear and had been guilty

[ \*944 ]

RAILTON  
v.  
MATHEWS.

[ \*945 ]

of fraudulent conduct, and that he was a defaulter, were facts which it was most material for the surety to be acquainted with. If those were held back merely from a kind motive to Hickes, and not at all from any selfish motive on the part of those to whom the bond was to be executed, the effect in point of law would be the same as if the motive were merely the personal benefit of the parties to receive the bond. It appears \*to me, therefore, that the learned Judge has misunderstood the meaning of the issue, and that having told the jury that a concealment to be undue must be wilful and intentional with a view to the advantage which the parties were thereby to receive, that was a misdirection, and that it had a tendency to mislead the jury; that it was wrong in point of law, and that the exception to that direction ought to be allowed.

Interlocutor complained of reversed; bill of exceptions allowed; and a new trial directed.

## IN COMMITTEE OF PRIVILEGES.

### THE FITZWALTER PEERAGE.

(10 Clark & Finnelly, 946—958.)

1842.

June 28.  
July 21.

1843.

May 9.  
June 22.

1844.

March 18.  
July 18.

Lord  
LYNDHURST,  
L.C.

[ 946 ]

Barony by writ—Abeysance—Former claim—Evidence.

An ancient Barony in fee, after having been enjoyed by the lineal heirs of the first Baron successively for centuries, then becoming dormant for some time, was claimed and again enjoyed by one who, after full investigation, was found to be the heir of the first and last Barons; it afterwards fell into and remained in abeyance among his coheirs for more than 80 years:

*Seemle*, that it is not necessary for one of these coheirs claiming the Barony, to give proofs of the first creation, and of the divers mesne descents of it (*infra*, p. 323).

*Seemle*, that on a claim to an ancient Barony, minutes of proceedings on a former claim, before the King in Council, are admissible in evidence in the House of Lords (*infra*, p. 320).

A long abeyance of a Barony in fee, if satisfactorily explained, is no objection to a claim (*infra*, p. 324).

A copy of a will produced from the Prerogative Office was received, after proof of unsuccessful searches for the original, and that the practice in the Office at the time of the date of the will was to give out the original wills after taking copies (*infra*, pp. 320, 321).

An old attested copy of a deed of settlement, produced from the proper custody, was received, after proof of unsuccessful searches for the original, and that the possession of the estates comprised in the settlement went with it (*infra*, p. 321).

ROBERT FITZWALTER (grandson and heir of Robert Fitzwalter, chief of the confederated Barons who obtained Magna Charta from

FITZWALTER  
PEERAGE.

King John) was summoned to Parliament as a Baron of the realm, by writ tested the 23rd day of June, 23 Edw. I. (1293). He was summoned to other Parliaments, in the reigns of Edw. I. and Edw. II.; and having sat in Parliament pursuant to such writs, he acquired a Barony to him and the heirs of his body (1). He died in 1325, and was succeeded in the dignity by his son and heir, \*from whom it descended to his lineal heirs male through five generations, till Humphrey Fitzwalter, the sixth Baron, died without issue in 1409, when the Barony devolved on his brother Walter, who was accordingly summoned to and sat in Parliament in the 7th & 9th of Hen. VI. Walter, the seventh Baron, died in 1432, leaving a daughter his sole heir, married to Sir John Ratcliffe. Her son and heir, John Ratcliffe, was summoned to and sat in the Parliaments of Hen. VII. as Baron Fitzwalter, and his descendants of the family of Ratcliffe successively enjoyed the dignity down to the year 1629, when Robert Ratcliffe, the 13th Baron, died without issue. The title then remained for some time dormant. It was claimed in 1641 by Sir Henry Mildmay, and in 1660 by Henry Mildmay, the former being the son, and the latter the great-grandson and heir of Lady Frances Ratcliffe, by her husband Sir Thomas Mildmay, of Moulsham, in the county of Essex (2). Lady Frances was the only daughter of Henry Ratcliffe, 10th Baron Fitzwalter; and through her, her said son and grandson claimed, each successively, to be sole heir of the first Lord Fitzwalter, and the latter was occasionally styled Lord Fitzwalter. Upon his death, without issue, in 1661, while his claim was pending, his brother and heir, Benjamin Mildmay, took up the claim; and after a long opposition from Robert Cheeke, Esq., a counter-claimant, he finally established his right to the Barony before the King in Council, in January, 1669, and he was accordingly summoned to Parliament as Lord Fitzwalter, by a writ tested the 10th of February of that year (22 Chas. II.). He consented (to avoid a controversy with other Peers, but with a *salvo jure*) to \*take his seat in the House of Lords as the last Baron of the reign of King Edw. I. (3). He died in 1679, and was succeeded by his

[ \*947 ]

[ \*948 ]

(1) See the *Hastings Peerage*, 54 R. R. 27, 37 (8 Cl. & Fin. 144 and 157, n.).

(2) See *Lords' Journ.* for 9th August, 1641; 20th and 27th of August, and 5th of September, 1660.

(3) See *Lords' Journ.* for 20th February and 6th March, 1667; for the

1st, 7th, 14th, 15th, 21st, 27th, and 29th of April, 1668; for the 14th and 28th of February, the 7th, 8th, and 24th of March, 1669; and the 27th of October, 4th and 10th of November, 1670. See also *Collins' Baro.* by Writ, 268 *et seq.*; 3 Dugd. Bar.

FITZWALTER  
PEERAGE.

eldest son, Charles, the 16th Baron, who died in 1727, without leaving issue, and was succeeded by his brother and heir, Benjamin, the 17th Baron, upon whose death, in 1756, without surviving issue, the Barony fell into, and has remained since in abeyance among the coheirs of his then deceased aunt, Mary Mildmay, wife of Henry Mildmay, of Graces, in the county of Essex, and only sister of Benjamin, the 15th Lord Fitzwalter, who, as before mentioned, established his right to the dignity in 1669.

In the year 1835, Sir Brook William Bridges, of Goodnestone, in the county of Kent, and of Graces aforesaid, Bart., presented his petition (1) to the King, stating the creation, descent, and abeyance of the Barony, and his own claim thereto as one of the coheirs of the said Mary Mildmay, and praying His Majesty to determine the abeyance in his favour, and direct a writ of summons to Parliament to be issued to him as Baron Fitzwalter. The King referred that petition, with the *Attorney-General's* report thereon (2), to the House of Lords, who referred the same to the Lords Committees for Privileges. The petitioner did not then proceed further in the prosecution of his claim; but in May, 1842, he laid on the table of the House his printed case, and a summary statement of \*the proofs in support of it, commencing with an extract from the books of the Privy Council, of the decision in favour of Benjamin Mildmay, in 1669; the petitioner being then under the impression that the House would not require proofs of the creation or mesne descents of the Barony.

The case stated the pedigree of the petitioner and of the other coheirs of the said Mary Mildmay, to this effect: That she married Henry Mildmay of Graces aforesaid, and died in 1715, having had issue by him several children, some of whom died young and unmarried, and five lived to be married; namely, Mary, the eldest, to Charles Goodwin; Lucy, the second, to Thomas Gardiner; Elizabeth, the third, to Edmund Waterson; Frances, the fourth, to Christopher Fowler; and Catherine, the fifth, to Thomas Townshend: that of these five coheiresses of Mary Mildmay, two (Mrs. Goodwin and Mrs. Waterson) died without issue, the former in 1724, the latter in 1746: that Mrs. Townshend died in 1708, having had issue two sons, both of whom died unmarried: that

p. 288; Cru. on Dignities, and the Lords' First Rep. on the Dign. of a Peer, pp. 445—446, and p. 486, n. 82,

and Appendix iv. to that Report.

(1) 67 Lords' Journals, p. 144.

(2) *Vide infra*, p. 320.

Mrs. Fowler, who died in 1705, had four sons, besides daughters; and Mrs. Gardiner, who died in 1742, had three sons and three daughters: that Mrs. Fowler's first and second sons died unmarried; and the third, Edmund (1) (who in these events became the heir of his mother), married a Miss Pateshall, in 1744, succeeded to his grandfather's estate of Graces in 1746, as devisee under the will of his maternal aunt, Mrs. Waterson, and died in 1751, leaving Fanny Fowler, his only surviving child and sole heir (two other children died \*in infancy): that she, Fanny Fowler, on the death of the last Lord Fitzwalter, in 1756, became one of the coheirs of that Barony; in 1765, she married Sir Brook Bridges, of Goodnestone aforesaid, Bart.; and having survived him, died in 1825, leaving Sir Brook William Bridges her son and heir, who married a Miss Foote in 1800, and died in 1829, leaving, besides other issue of his said marriage, this petitioner, his eldest son and heir, who therefore is one of the coheirs, if not sole heir, of the said Barony.

FITZWALTER  
PEERAGE.

[ \*950 ]

The case then went on to trace the issue of Mrs. Gardiner; and after stating that her three sons and one of her daughters died unmarried, stated that her eldest daughter, Lucy, married Sir Richard Bacon in 1728, became in 1756 one of the coheirs of the Barony, and died in 1765 without surviving issue: that Mrs. Gardiner's second daughter, Jemima, married John Joseph, a surgeon, by whom she had an only child, Jemima, who married Robert Duke, a draper, of Colchester, became one of the coheirs of the said Barony in 1756 (her mother being then dead), and died in 1761, leaving two sons and a daughter surviving; that these children, at least two of them, went with their father to America, but the petitioner was not able, after much inquiry, to discover what became of any of them, or whether they or any of their issue were living.

The petitioner added to his case an extract from the report of the *Attorney-General* (Sir F. Pollock) on his petition, concluding thus: "That on the death of Dame Lucy Bacon, in 1765, without surviving issue, the Barony appeared to him to be in abeyance between the representatives (if any such existed) of the said Jemima Duke, and the petitioner; but that if all issue from the said Jemima Duke should have been \*extinguished, the right to the Barony would devolve solely to the petitioner." However, on account of the

[ \*951 ]

(1) It was not proved that Mrs. Fowler had any son but Edmund. A pedigree found among his papers was the only evidence of the existence of

these two, and the same pedigree extinguished them. See, as to this pedigree, *ante*, p. 80 *et seq.*



FITZWALTER  
PEERAGE.

importance of the matter, he (the *Attorney-General*) recommended to his Majesty to refer it to the House of Lords.

After this case had been presented, and the proofs therein referred to taken by the Committee, the claimant was advised, *ex majori cautela*, to give proofs of the creation of the dignity, and the divers descents thereof through the families of Fitzwalter and Ratcliffe, down to the revival of it in Benjamin Mildmay in 1669. He accordingly petitioned the House, and obtained leave to present a statement of such supplemental proofs, which was accordingly laid on the table.

The Committee of Privileges met several days in the Sessions of 1842, 1843, and 1844, to take the proofs, *Mr. Loftus Wigram* and *Sir Harris Nicolas* attending as counsel for the claimant, and the *Attorney-General* for the Crown. The following points, among others (1), arose on the admissibility of evidence:

It was proposed to put in the proceedings before the Privy Council, and the decision there in the year 1669, on the claim of Benjamin Mildmay.

The Lords of the Committee asked whether there was any precedent for receiving proceedings before the Privy Council on claims before this House, as proceedings before former Committees of Privileges.

The claimant's counsel said they were not aware of any precedent (2), but the House had acted on these proceedings; effect having been given to them in assigning precedence to Lord Fitzwalter, on his taking \*his seat in 1669 (3). They also referred to the Third Report of the Lords Committees on the Dignity of the Peerage, and to Appendix IV. to the First General Report, where these proceedings are printed.

[ \*952 ]

A minute of the proceedings, dated the 19th of January, 1669, was then received, *de bene esse*.

Some copies of ancient instruments in the Rolls' Chapel were produced, under the seal of the Record Office, and received in evidence (according to the Act 1 & 2 Vict. c. 94, ss. 11, 12, & 13) without further proof.

A deputy keeper of records in the Prerogative Office produced a copy, instead of an original will, dated 1646; and being asked why

(1) *Vide ante*, p. 80.

(2) See the *Roscommon Peerage*, 49 R. R. 30 (6 Cl. & Fin. pp. 103, 129); the *Braye Peerage*, 49 R. R. 174 (6 Cl. & Fin. p. 757), and the

*Beaumont Peerage*, 49 R. R. 250 (6 Cl. & Fin. p. 879).

(3) See *Lords' Journ.* for 14th Feb. and 10th Nov., 1669.

he did not bring the original, explained that for some centuries prior to the year 1700 the original wills were generally given out to the executors, after being registered in the books and copies taken, and those copies were preserved in bundles in the office, to stand as originals. The receipts given by the executors for the originals were filed in like manner. He had the receipt for the original will in this case. About the year 1700 the practice was altered; the original wills being since kept, and copies given out.

FITZWALTER  
PEERAGE

The Lords of the Committee asked for any instance of a copy of a will being received in evidence.

The claimant's counsel referred to the proceedings in the *Braye Peerage* (1).

The copy was then received.

A copy of a deed of settlement made on the marriage of Charles Lord Fitzwalter, and dated the 25th \*of May, 1693, was proposed to be put in evidence. The solicitor of the Mildmay family, who produced it from their muniments of titles, said, that family is in possession of the estates comprised in the deed: he searched in vain among their title-deeds for the original of this, but did not inquire for it of the trustees named in it, or of their descendants. The copy had this indorsement: "February 27th, 1727. This is a true copy, carefully examined with the original settlement, by us; PENISTON LAMB, SAM. HARPER."

[ \*953 ]

The copy was then admitted, as an old attested copy coming out of the proper custody, subject, however, to objection afterwards, as to its admissibility, with direction also to the witness to make further searches for the original.

Proofs were on a subsequent day given of further searches for the original deed, and also for the original will, dated 1646, of which a copy had been received. These searches having proved unsuccessful, several other instruments were put in evidence confirmatory of both copies; and the claimant's counsel urged, as to the copy of the deed, that inasmuch as it was produced from the proper custody, and it was shown by other deeds that possession had gone along with it for many years, there could not be any valid objection to its admissibility in evidence: Buller's N. P. 361.

The *Attorney-General* admitted that it was the practice at Nisi Prius to receive copies of deeds under these circumstances, if brought from the proper custody.

(1) 49 R. R. 174 (6 Cl. & Fin. 757); and see *Netterville Peerage*, 35 R. R. 107 (2 Dow & Cl. 342).

FITZWALTER  
PEERAGE.

[ \*954 ]

No question arose on the admission of the numerous instruments referred to in the supplementary paper laid before the House by the claimant. They consisted of writs of summons, extracts from Parliament \*Rolls, *post-mortem* inquisitions, and other documents, the same which had been received in 1668 and 1669, on the claim of Benjamin Mildmay.

[ \*955 ]

*Mr. Wigram*, having summed up the evidence on behalf of the claimant, observed, in conclusion, that the only difficulty in the deduction of the title to his client was, the unascertained fate of the issue of *Jemima*, the second daughter of *Mrs. Gardiner* (*Lucy Mildmay*) (1). The evidence extinguished the issue of the other coheirs; and, therefore, taken thus far, it would leave the title of *Fitzwalter* in abeyance between the present claimant and that *Jemima's* issue. She married a person of inferior rank to herself, *John Joseph*, of *Kelvedon*, in *Essex*, as shown by the family pedigree, and by the pedigree notes in the handwriting of *Edmund Fowler* (2), which state that she had a child, named *Jemima*. We have made every inquiry to find what became of that child, and the result of those inquiries is that she married a person of the name of *Robert Duke*; and we have called a witness, who, having had occasion to obtain an assignment of an old outstanding term, made inquiry for that purpose respecting this family, and he was informed that *Robert Duke* had emigrated to America. We have, then, proved that through paid agents we have made inquiries in America and the Colonies, and everywhere else that we could, to trace this *Jemima's* descendants; we have advertised also, but we can learn nothing at all of them. Therefore I feel that we are not in a position to say that we have completely proved the failure of her issue. The way in which I should put the case to your Lordships is, as the result of the evidence shows, that the title \*has either devolved upon the claimant, if this *Jemima* has died without issue; or, if there be any descendants of *Jemima*, then that the title is in abeyance between the claimant and such descendants. The report which I should ask of your Lordships is, that the Barony fell into abeyance in the year 1756, between this claimant's grandmother *Fanny Bridges*, *Dame Lucy Bacon*, and *Jemima Duke*, as the coheirs of *Mary Mildmay*; that *Dame Lucy Bacon* afterwards died without issue, and that no descendant of *Jemima* can now be found; that the Barony has therefore either devolved absolutely

(1) *Vide supra*, pp. 318, 319.

(2) *Vide ante*, p. 80.

upon the claimant, or, if there be in existence any undiscovered descendants of Jemima Duke, then that it is in abeyance between the claimant and them.

FITZWALTER  
PEERAGE.

*The Solicitor-General (Sir F. Thesiger) :*

This is the first occasion upon which I have had the honour to attend your Lordships in this case. I have very carefully looked over the evidence in proof of the pedigree, and it appears to me to be entirely satisfactory. I am told, also, that the present Lord Chief Baron (Sir F. Pollock), who has watched the whole of these proceedings before your Lordships when he was *Attorney-General*, is satisfied that the pedigree is proved.

It was necessary for the claimant to make out, in the first place, that this was a Barony in fee, and I think that is established from the proof which has been given that upon two occasions the title devolved upon parties through females. The first instance was through Elizabeth, the only child of the seventh Lord Fitzwalter, by whom it came to the Ratcliffes, and afterwards to the Mildmays through Lady Frances Ratcliffe. Therefore I apprehend there is \*no doubt whatever that it is a Barony of the description contended for by the claimant. I think that is also proved by the proceedings in your Lordships' House upon the claim of Benjamin Mildmay in 1667, 1668, and 1669. Indeed I think the claimant might have almost commenced his evidence from those proceedings; but he has gone further, and proved the creation of the title in the reign of Edw. I., and he has, I think, deduced it clearly down to Benjamin Mildmay, who established the claim in 1669. There is no doubt whatever that that claim was in respect of the title which was created in the reign of Edw. I., for that is proved by the subsequent proceedings in this case, which ultimately resolved themselves into this, that he consented to take his seat in your Lordships' House as the junior Baron of the reign of Edw. I. I apprehend, therefore, that up to that point there is no difficulty whatever.

[ \*956 ]

The title fell into abeyance in the year 1756, upon the death of Benjamin Mildmay, among the coheirs of Mary Mildmay, who was the sister of that Benjamin Mildmay who succeeded in establishing his title in 1669. I do not think the claimant has given very satisfactory evidence to account for the long abeyance, such as your Lordships generally require. The title fell into abeyance eighty-eight years ago, and there is no account given why it was

FITZWALTER  
PEERAGE.

permitted to remain so long dormant. That is an observation which I feel it my duty to throw out for your Lordships' consideration.

[ \*957 ]

The only other part to which I would draw your Lordships' attention is the evidence with regard to the branch of the Gardiners. Your Lordships observe that Lucy Mildmay, Mrs. Gardiner, is the eldest sister of the claimant's ancestor, Frances Mildmay, \*Mrs. Fowler. It is important that he should satisfactorily account for that branch : I will not trespass upon your Lordships' time by adverting to the evidence on that subject. It will be for your Lordships to say whether it is satisfactory ; whether the parties have used due diligence, and have resorted to the proper means for the purpose of discovering evidence for the extinction of that, the Gardiners' branch of the family. I do not mean to say that they have not done so : I merely throw it out for your Lordships' consideration whether it is satisfactory. It is difficult, perhaps, to trace a family which has fallen into decay, and appears to have emigrated ; but still the result would be that the claimant, if that branch is extinct, would be the sole heir ; if not, a coheir.

THE LORD CHANCELLOR :

I think the descendants of Jemima and Robert Duke are not sufficiently accounted for.

*Mr. Wigram :*

We do not conclusively prove their extinction.

THE LORD CHANCELLOR :

The probability is that some are in existence ; whether they can be found or not, is another question. What do you say as to the observation made by the *Solicitor-General*, that you have not sufficiently accounted for the time that has elapsed since the Barony first fell into abeyance ?

*Mr. Wigram :*

[ \*958 ]

I do not apprehend that that ought to be an objection : the Barony fell into abeyance in 1756. There are cases in which claims have been sustained after an abeyance of upwards of 100 years (1). It \*may have been that none of the persons entitled at

(1) The Barony of Vaux of Harrowden was in abeyance from 1663 to 1838 : 47 R. R. 105 (5 Cl. & Fin. p. 526) ; the Braye Barony, from 1557 to 1839 ;

any time since 1756 to this Barony, was in possession of means which would make him aspire to a seat in your Lordships' House. I may add, that the grandmother of the claimant, Dame Fanny Bridges, lived till 1825, so that there has been scarcely any default in making the claim; for a female would not be so anxious for the dignity as a male heir.

FITZWALTER  
PEERAGE.

THE LORD CHANCELLOR :

Then you claim as one of the coheirs. What are the terms of your claim ?

*Mr. Wigram :*

That the Barony fell into abeyance upon the death of Benjamin Mildmay in 1756, between Dame Fanny Bridges, Dame Lucy Bacon, and Mrs. Jemima Duke, as the then coheirs of Mary Mildmay. We have shown that Dame Lucy Bacon died without issue; so that, assuming that Jemima Duke had issue, we say the Barony is now in abeyance between the claimant and her descendants, if any there be.

THE LORD CHANCELLOR :

I think that case is made out satisfactorily. It appears to me, my Lords, that the claimant has satisfactorily shown that the Barony is in abeyance between himself and the descendants, if any, of Jemima Duke; therefore, that his claim is established, only so far as his being one of the coheirs.

The Committee resolved accordingly, that the Barony of Fitzwalter is now in abeyance between the petitioner, Sir Brook William Bridges, Bart., as grandson and heir of Dame Fanny Bridges, and the descendants (if any) of Jemima Duke; and the Chairman was directed to report the resolution to the House.

the Camoys, from 1427 to 1840; the Beaumont, from 1509 to 1840: *vide* 49 R. R. 250 (6 Cl. & Fin. pp. 757, 789, and 868); and the Hastings Barony was in abeyance from 1540, if not from 1389, to 1840: *vide* 54 R. R. 27 (8 Cl. & Fin. p. 144).

## BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

ON APPEAL FROM THE HIGH COURT OF ADMIRALTY OF ENGLAND (1).

JUNIUS SMITH *v.* NATHANIEL GOULD AND OTHERS (2).

THE PRINCE GEORGE.

(4 Moore, P. C. 21—28.)

1842.  
Feb. 11, 19.  
June 22.

Lord  
CAMPBELL.

[ 21 ]

A bottomry bond may be good in part, though void for the residue.

Where, therefore, a bottomry bond was given by the master at New York, as well for advances to obtain his discharge from arrest, at the instance of the consignees, on account of damage done on the voyage to part of the cargo; as for payment of the port duties and other disbursements necessary to enable the ship to prosecute her voyage; the Judicial Committee, reversing so much of the decision of the Admiralty Court as rejected the bond *in toto*, sustained the bond to the extent of the sums advanced for necessary supplies and payment of the port duties.

If reliance is placed upon a difference between the law of England and a foreign State, the party relying upon the difference is bound to prove the fact by witnesses or authorities.

[ \*22 ]

THIS was an appeal from a sentence of the Judge of the High Court of Admiralty in a cause of bottomry, brought by the appellant, the legal holder (as assignee of Messrs. Wadsworth and Smith of New York, merchants,) of a bottomry bond, dated 14th September, 1836, for 294*l.* 10*s.*, on the ship *Prince George*, and the freight to be earned on a voyage then intended to be made by her; against the said ship, her tackle, &c.; and against Nathaniel Gould and James Dowie, of London, merchants, and Peter M'Gill, and William Price, of Quebec, merchants, intervening in the cause, as the present owners of the ship.

In the month of September, 1836, the ship *Prince George* arrived at New York from London with a general cargo, and a large number of passengers, under a charter-party to the appellant, being destined from thence to Quebec under a charter-party to the respondent Gould and others. By the charter-party to the appellant, a moiety of the freight (the entire sum being 506*l.*) was payable in London, previous to the sailing of the ship, and the remainder in New York, on the right delivery of the cargo there. During the voyage, the master broke bulk, and made use of some porter, part of the cargo on freight, a portion of which he used as ship's stores for the crew, and the remainder he sold to some of

(1) Present: Lord Wynford, Lord Brougham, Lord Campbell, and Mr. Justice Erskine. (2) *The Karnak* (1868) L. R. 2 Ad. & El. 289, 299; *The Ida* (1872) L. R. 3 Ad. & El. 542, 550.

the steerage passengers. On landing the cargo at New York, part of it was found to have been damaged by bad stowage. The consignees of the porter claimed 568 dollars, as the value of the deficiency thereof, and the owners of the damaged cargo claimed 1,115 dollars, as the amount of the damage. The only fund the master had to meet these claims and the port charges, and the expenses of furnishing the ship with provisions, and fitting her for sea on her further voyage under the second charter-party, was the moiety of the freight, amounting to 253*l.*, payable at New York under the first charter-party, which the consignees refused to pay, and the master, not being able to satisfy their claims for the deficiencies in, or damage done to, the cargo, was arrested at their instance. To relieve \*himself from this arrest, the master applied to Messrs. Wadsworth and Smith, the correspondents and agents of the appellant at New York, to advance such sums as might be necessary to meet his exigencies, and as neither he nor the owner of the ship had any personal credit in that city, they advised him to raise funds, which they ultimately agreed to furnish on bottomry. No money actually passed through the hands of the master, but Messrs. Wadsworth and Smith made up their accounts, and debited the money received by them for freight, with the claims for damage done to the cargo, and paid the charges and expenses of the ship at New York, necessary to enable her to proceed on her destination, and for re-payment of such advances, with a maritime interest of 20 per cent., the master executed the bond now sued for. Messrs. Wadsworth and Smith also drew a bill of exchange for the amount advanced on the owner of the ship, payable at one day's sight after her arrival in London, in the event of which the bond was to be considered as satisfied. The bill of exchange having been presented and refused payment, the present suit was instituted, and the learned Judge (the Right Hon. Dr. LUSHINGTON,) by his decree, bearing date the 2nd of March, 1838, pronounced against the force and validity of the bond.

SMITH  
r.  
GOULD.

[ \*23 ]

From this sentence the present appeal was brought.

*The Queen's Advocate* (Sir John Dodson), and Mr. Toller, for the appellant :

Contended that the bond was, in the circumstances, good and valid, the money being advanced for the necessities of the ship in a foreign port, where the master and owners were without personal credit ; that the fact of part of the money advanced on the bond,



SMITH  
v.  
GOULD.  
[ \*24 ]

\*being for the payment to the consignee for damage done to the cargo, did not invalidate the bond, the consignee having by the law of New York a specific lien on the ship, and the master, being without funds from which such damage could be paid, had no other remedy than to hypothecate the ship, to save it from being arrested and sold by the Admiralty Court in New York; that the bill of exchange was only a collateral security, and did not substitute personal security for the hypothecation of the ship.

*Dr. Phillimore*, for the respondents :

Submitted that the circumstances of the case did not show such a necessity as to warrant the master hypothecating the ship, which was done by him solely for the purpose of meeting the personal demand against himself, in respect of the porter, and the claim of the consignees in respect of the damaged goods.

The following authorities were referred to in the course of the argument: *The Augusta* (1), *The Vibilia* (2), *The Jane* (3), *The Zodiac* (4), *Thomson v. The Royal Exchange Insurance Company* (5); *Abbott on Shipping*, 128—130; 1 *Kames Essays: Mercatores*, 128; 3 *Kent's Com.* 168; *The General Smith* (6).

June 20.

LORD CAMPBELL :

This is an appeal from the Court of Admiralty, in a suit on a bottomry bond.

[ \*25 ] The learned Judge below was of opinion that the bond was wholly void, on the ground that the master \*had no authority to hypothecate the ship for any part of the money secured by it.

We should have been of the same opinion, if we had taken the same view of the facts of the case which he appears to have done. If the bond had been given as a security for the amount of the damage done to the cargo on the voyage from London to New York, and the value of certain porter, part of the cargo consumed during the voyage, we should have thought it invalid. The appellant's counsel have contended, that by the law of New York, the consignees of the cargo had a specific lien on the ship for any damage sustained by the cargo, in violation of the contract contained in the bill of lading, and that as the master had no funds from which this damage could be paid, he might hypothecate

(1) 1 *Dod. Rep.* 283.

(2) 1 *W. Robinson*, 1.

(3) 1 *Dod. Rep.* 461.

(4) 1 *Hagg. Adm. Rep.* 320.

(5) 14 *R. R.* 388 (1 *M. & S.* 30).

(6) 4 *Wheaton, Sup. Ct. of U. S.*  
*Rep.* 498.

the ship for the amount, so that she might prosecute her voyage, instead of being arrested and sold by decree of the Admiralty Court. If it had been proved that the law of New York gave the lien upon the ship as suggested, we should have thought, upon the general principle, that where the master cannot in any other way raise money which is indispensably necessary to enable the ship to continue her voyage, he may hypothecate the ship: this power would extend to a case where the ship might be arrested and sold for a demand for which the owner would be liable. It seems immaterial whether the necessity for funds arises from such a demand, or to pay for repairs, stores, or port duties.

SMITH  
v.  
GOULD.

But in this case, there is no sufficient evidence that, by the law of New York, the consignee of goods has any specific remedy against the ship for damage they may have sustained in the course of the voyage. No witness professing to be acquainted with the law upon the subject has been examined; and the witnesses who have \*been examined, only use some loose expressions, from which a doubtful inference as to the state of the law may be drawn.

[ \*26 ]

It is said indeed that we ought, in the absence of evidence, to presume the law to be as contended for by the appellant, the law of England upon this subject being an exception to the law of all other commercial nations. But we apprehend that where reliance is placed by any party upon a difference between the law of England and the law of a foreign State upon such a subject, he is bound by witnesses, or books of authority, to show that there is such a difference. In the present instance we believe that the presumption would be contrary to the truth; for, although the law of most commercial nations except England gives a specific remedy against the ship for repairs and stores to fit her out for a voyage, it is only in a few States that this remedy against the ship is extended to damage done to the cargo; and there is every reason to believe that such is not the law in New York, as it appears that an Act was passed by the Legislature of that State, giving a lien on the ship only for repairs and stores (1), leading to the conclusion that the law of that State upon this subject is not further varied from the ancient commercial law of England.

We, therefore, cannot pronounce for the validity of the bond on this ground; and if it really had been given entirely in respect of the claim of the consignees of the cargo, we must have affirmed the decree.

(1) Acts of 22 Sess. c. 1, and 40 Sess. c. 59.

SMITH  
v.  
GOULD.

[ \*27 ]

But upon carefully examining the evidence and the accounts, it appears to us that with the exception of the sum of 929 dollars, the money secured by the bond was required for the ship's necessary disbursements at New \*York. By the charter-party and bills of lading, a sum of 253*l.* for freight was payable at New York. If this had been received by the master, and therewith he had paid all his port charges and outfit, and a demand being afterwards made upon him by the consignees, he had executed the bottomry bond to satisfy this demand; in the absence of evidence of the foreign law upon the subject, we should have considered the bond wholly void. But the depositions show that the master did not receive the 253*l.*, and that the whole of that sum was detained by the consignees to cover the amount of the damage done to the cargo, except a balance of eight dollars ninety-one cents. The master had no means of compelling payment of the freight in full. He, therefore, had no funds from which he could pay port duties and other necessary disbursements to enable him to prosecute his voyage, and it is admitted that he could not raise the necessary funds without hypothecating the ship. The bond, therefore, was to secure money borrowed to pay port duties and such other necessary disbursements, not merely to satisfy the demand of the consignees for damage done to the cargo. But we cannot say that the bond is good for the whole. In the principal sum of 1,167 dollars, for which it is given, is included an item of 929 dollars in respect of porter, part of the cargo, consumed during the voyage. The evidence certainly shows that the ship was well supplied with water and stores of all sorts, and that it was from the unusual length of the voyage that it became necessary for the crew and passengers to use this porter. But there is no evidence before us that by the law of New York, the consignee of the porter could have detained the ship till his demand was satisfied. The master

[ \*28 ]

\*was arrested; but, assuming that he was lawfully arrested, it is impossible to lay it down for a rule that the master may hypothecate the ship for any demand in respect of which he himself is liable to be arrested in a foreign country.

For the sum of 929 dollars, and the maritime interest calculated upon that sum, the bond cannot be supported. But it is a well-known doctrine in the Admiralty Courts that a bottomry bond may be good *pro tanto*, and void for the residue.

Some other small items have been pointed out to us as having been expended before there is evidence of any negotiation for a bottomry

bond, but we think that these items may be fairly included in the sum to be secured, and that we may presume they were advanced in contemplation of such a security. Bottomry bonds, for the benefit of the ship owners, and the general advantage of commerce, are greatly favoured in Courts of Admiralty; and where there is no suspicion of fraud every fair presumption is to be made to support them.

Upon the whole, their Lordships will recommend to her Majesty that the decree of the Court below be reversed, and that, deducting the amount of the 329 dollars and interest, there be a decree in favour of the appellant, for the principal and interest secured by the bond, with the costs of the appellant below, leaving the parties respectively to pay their own costs of appeal.

SMITH  
v.  
GOULD.

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ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (1).  
CHARLES HENFREY v. MARY ANN HENFREY (2).  
(4 Moore, P. C. 29—36.)

1842.  
Feb. 14, 19.

DR. LUSH-  
INGTON.  
[ 29 ]

A testator left two substantive wills, each disposing of his entire property. By the first, dated in 1838, he appointed executors, to one of whom he gave the residue of his estate. By the second will, dated in 1839, which contained no revocation of the prior one, he gave the whole of his property to his wife, with the exception of 5*l.*; but appointed no executors: Held, affirming the decree of the Court below, that the second will operated as a revocation of the first will, and was alone entitled to probate.

*Semble.* Where a party, objecting to a paper annexed to letters of administration, has been by the Court assigned to declare whether he propounds another instrument, it is irregular and inconclusive, instead of following up the assignation, to have the question decided upon petition. But such procedure estops the parties from further litigation.

A reply on the hearing of the appeal allowed, though not allowed by the practice of the Court below on the original hearing of the act on petition.

HENRY HENFREY, formerly of Foundling Terrace, Gray's Inn Road, in the county of Middlesex, but late of Havre de Grace in France, died on the 27th of December, 1839. At his death two testamentary papers were found. The first bore date the 14th of July, 1838, and the other the 26th of February, 1839.

The will of the 14th of July, 1838, was in the following terms :

“First: I direct that all my just debts and funeral and testamentary expenses shall be paid and satisfied. And whereas I am entitled, under the settlement made on my marriage with my present wife Marian, otherwise Mary Ann Henfrey, and in the

(1) Present: Lord Brougham, Lord Campbell, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

(2) *Lemage v. Goodban* (1865) L. R. 1 P. & D. 57, 62; *Dempsey v. Lawson* (1877) 2 P. D. 98, 107.

HENFREY  
 c.  
 HENFREY.  
 [ \*30 ]

events therein mentioned, to the reversion of the sum of two thousand \*pounds, to be paid and invested under the trusts of the said settlement. Now I give and bequeath unto my said wife Marian, otherwise Mary Ann Henfrey, her executors, administrators, and assigns, one moiety of the said sum of two thousand pounds so settled and to be paid and invested as aforesaid. And I give and bequeath to my said wife all my plate, linen, china, and household effects, and subject to the payment of all my just debts and funeral and testamentary expenses. I give and bequeath all the rest and residue of the estate and effects to which I am or at any time may be entitled, or which I have or may have power to dispose of by this my will, including all my contingent interest under my late father's will, unto my brother, Charles Henfrey, his executors, administrators, and assigns. And I appoint my said brother, Charles Henfrey, and my brother-in-law, Charles Marston Stretton, executors of this my will. And I hereby declare my mind and will to be, that the said Charles Henfrey, and Charles Marston Stretton, shall not be answerable or accountable for any more monies than they shall actually receive under this my will, nor for any involuntary loss whatsoever. And lastly, I hereby revoke and make void all my other wills." In witness whereof, &c.

The second paper was in these words :

"I hereby leave all I possess in this world to my wife, Mary Ann Henfrey, containing household furniture, books, &c. I likewise wish to be paid to Miss Diana Maddox the sum of five pounds, which money was borrowed for my use. This 26th day of February, 1839."

This paper was signed by the testator, and attested by two witnesses.

[ 31 ]

On the 8th of November, 1839, letters of administration, with the last-mentioned paper annexed, were granted to the said Mary Ann Henfrey. In the month of February, 1840, the appellant commenced proceedings for the purpose of revoking the letters of administration, and of obtaining probate of the two papers together, as containing the will of the deceased. The appellant was then, in the usual form, assigned to declare whether he propounded the paper of 1838. This assignation was not followed up, but with the consent of the respondent, the question came on to be decided on an act on petition ; brought in by the appellant, in which he alleged the due execution of both papers by the deceased, and prayed that the administration heretofore granted, might be declared null and void ; and probate of the two papers granted to the executors.

On the 5th of June, 1840, the Judge of the Prerogative Court (Sir HERBERT JENNER) by his decree overruled the petition, and confirmed the letters of administration already granted (1).

HENFREY  
H.  
HENFREY

From this decision the present appeal was brought.

*Mr. Loftus Wigram, Q.C., and Dr. Addams, for the appellant :*

Argued that the second will was no revocation of the prior one ; that it contained a different specification of property, and was not an ademption of the prior bequests ; that there was nothing inconsistent in the two instruments taken together ; and that the circumstance of there being no executors named in the second will, indicated that the testator did not intend that \*instrument as a substitution of the former will, which appointed executors ; that the meaning of the testator could not be ascertained, or his intentions carried out, by a court of equity, without reference to the prior will ; that the words, "all I possess in this world, containing household furniture, books, &c.," was meant to comprise property not disposed of by the prior will ; and that probate ought, therefore, to be granted of the two instruments, as forming one substantive and effective will, otherwise it would preclude the appellant from raising the question as to the residue in a court of equity. They cited and relied on the following authorities : Swinburne, p. 7, sec. 14 ; Williams, Exors. 147, 207 ; 2 Roper's Husb. and Wife, p. 5 ; *Beard v. Beard* (2) ; *Timewell v. Perkins* (3) ; *Bridges v. Bridges* (4).

[ \*32 ]

*The Attorney-General (Sir F. Pollock), Dr. Haggard, and Mr. Kinglake, for the respondent :*

Insisted that the second instrument was a good substantive will, and ought not to be deemed merely a codicil ; that it contained a complete disposition of the testator's estate ; and that even if the former paper was requisite to enable a court of construction to interpret the latter, that was no ground for granting probate, or declaring that a will, which was in fact revoked and cancelled ; that to entitle two instruments to probate, the latter must be incomplete ; and that the appointment of executors was not necessary since the statute of 11 Geo. IV. & 1 Will. IV. c. 40, which gave the undisposed residue to the next of kin ; \*they cited also 7 Will. IV. & 1 Vict. c. 26 ; Williams, Executors, 172, 1161.

[ \*33 ]

(1) Reported 2 Curteis, Ecc. Rep.

(3) 2 Atk. 102.

468.

(4) Vin. Abr. tit. Dev. (O. b) 18.

(2) 3 Atk. 73.

HENFREY

c.

HENFREY.

Feb. 19.

*Dr. Addams*, in reply (1).

THE RIGHT HON. DR. LUSHINGTON :

In this case the testator, at his death, left behind him two testamentary papers, both duly executed, the first bearing date the 14th of July, 1838, the second the 26th of February, 1839. On the death of the testator, administration had been originally granted to the widow, with the latter paper only annexed. This administration was called in by the brother of the testator interested under the paper of 1838 ; the brother was then in the usual form assigned to declare whether he propounded the paper of 1838. This assignation was never complied with, but a novel mode of proceeding was resorted to, and, as is alleged, with the consent of the widow ; a mode of proceeding certainly irregular, and which might, in many cases, be productive of serious inconvenience ; for, in fact, this act on petition is a mere motion. Neither the principal parties could be concluded by it, nor persons claiming under them, nor other persons, if there had been any interested under either of the papers ; and this might operate most inconveniently against one of the most salutary rules of the Prerogative Court, which, where a paper is regularly propounded, and no fraud, has the effect of binding subordinate interests, though not made parties \*to the cause ; of this opinion was the learned Judge of the Court below, when he stated at the end of his judgment that the question might be brought on in a more formal shape.

[ \*34 ]

Inconclusive, however, as these proceedings may be, unless the parties are estopped by agreement from further measures, their Lordships must now determine whether the decree of the Court below, on the case as represented to that Court, was justly founded.

The question to be decided is, whether the subsequent paper is a total or a partial revocation of the will first executed—whether it be a codicil to it or not ; for I greatly doubt if in any possible view of the case, probate could pass of the two papers as containing the will. I know not of any case resembling this, of two executed papers receiving probate as containing the will : *Ingram v. Strong* (2).

Then the question is, total revocation or partial revocation. On this question, Sir JOHN NICHOLL says in *Methuen v. Methuen* (3), “ In the Court of Probate the whole question is one of intention ;

(1) An objection was taken to the reply, as contrary to the practice in the Court below, on an act on petition, but their Lordships observed that the uniform practice in this Court was to allow the appellant's counsel to reply.

(2) 2 Phill. 312, 313.

(3) 2 Phill. 426.

the *animus testandi* and the *animus revocandi* are completely open to investigation in this Court."

HENFREY  
v.  
HENFREY.

In deciding this question, reference is always had in the first instance to the instruments themselves, which, of necessity, involves for this purpose, though containing the *animus revocandi*, the construction of the papers; of this there never was or could be any doubt; for it was literally the daily practice of the Court; the doubts which did arise as to the extent which the Court would or must go in the construction of instruments, was as to the construction of powers, not of the testamentary instruments made under them, for the purpose \*of ascertaining the *animus testandi*; and *Hughes v. Turner* (1) settled that, even in the case of powers, the Court was not at liberty to relieve itself from the task of construing the power itself.

[ \*35 ]

In this case there are no facts or circumstances or other evidence, and the conclusion must be drawn from the instruments themselves exclusively.

Now the testator, by the will of 1839, must be presumed to have intended to make some alteration in his testamentary disposition; but if the words of that instrument are to be limited according to the construction attempted to be put upon them by the appellant, the only possible alteration would be to give the books in addition, if they do not pass before, by the words "household effects," but this limitation would be wholly inconsistent with the large terms in which the bequest is framed. The words "I hereby leave all I possess in this world," would *prima facie* import a bequest of all which the testator had the power to bequeath. Then are they qualified and restricted to what on the face of the papers appears but a small part? The word "containing" may certainly admit of being construed as meaning "inclusive," and not as taxative of the general bequest, and this clearly appears to their Lordships to be the true construction.

Then, the will of 1839 gives the whole property to the wife. On what possible principle can it be contended that it does not revoke the former will? Can two wills, both disposing of the whole property, be included in one probate? Can the will of 1838 be joined in probate with the will of 1839? Such a course would be against the whole practice of the Court, and productive of utter confusion and litigation. Sir JOHN NICHOLL, in *Masterman v. Maberly* (2), \*said, "Is there any instance where two papers, both

[ \*36 ]

. (1) 3 Hagg. Ecc. Rep. 30.

(2) 2 Hagg. Ecc. Rep. 236.



HENFREY  
H. HENFREY.

complete as to the disposition of personalty, and where the only defect of the second paper is a want of due execution, have been admitted to probate as together containing the last will?" And in that case there was much less objection, for the second set of papers was unexecuted. But it is said that there is no revocation of the appointment of executors, and that the case of *Beard v. Beard* (1) is an authority for the prayer now made; but that case was totally different. In that case there was no revocation of the will, as a will, by any subsequent testamentary paper. The operation of the will was prevented by deed-poll; so it might be by bankruptcy, loss, or giving away of property, or death of legatees; but into such facts a court of probate never inquires; it knows nothing but of revocation by subsequent will of the instrument itself, or legal or presumed revocations of the instrument itself; as cancellation; or, before the late statute, marriage of a woman, or marriage and birth of a child.

As to the authority from Swinburne, that doctrine has been exploded so far back that it would be difficult to trace it, and the rule stated by Sir J. NICHOLL established, viz., that a paper, disposing of the whole property, is a revocation *in toto* of a previous will, also disposing of the whole. The appeal must be

*Dismissed with costs.*

ON APPEAL FROM THE SUPREME COURT OF THE ISLAND OF  
NEWFOUNDLAND (2).

EDWARD KIELLEY *v.* WILLIAM CARSON, JOHN  
KENT, AND OTHERS (3).

(4 Moore, P. C. 63—92.)

1841.  
Jan. 4, 5, 6.  
1842.  
May 23.  
1848.  
Jan. 11.  
PARKE, B.  
[ 63 ]

The House of Assembly of the island of Newfoundland does not possess, as a legal incident, the power of arrest, with a view of adjudication on a contempt committed out of the House; but only such powers as are reasonably necessary for the proper exercise of its functions and duties as a local Legislature.

*Semble.* The House of Commons possess this power only by virtue of ancient usage and prescription; the *lex et consuetudo parliamenti*.

*Semble.* The Crown, by its prerogative, can create a Legislative

(1) 3 Atk. 72.

(2) Present: The Lord Chancellor, Lord Brougham, Lord Denman, Lord Abinger, Lord Cottenham, Lord Campbell, the Vice-Chancellor of England, the Lord Chief Justice of the Common Pleas, Mr. Baron Parke, Mr. Justice Erskine, and the Right

Hon. Dr. Lushington.

(3) Approved and followed in *Doyle v. Falconer* (1866) L. R. 1 P. C. 328, 36 L. J. P. C. 34; *Phillips v. Eyre* (1870) L. R. 6 Q. B. 1, 19; *Barton v. Taylor* (1886) 11 App. Cas. 197, 203, 55 L. J. P. C. 1.

Assembly in a settled Colony, subordinate to Parliament, but with supreme power within the limits of the Colony for the government of its inhabitants; but

KIELLEY  
v.  
CARSON.

*Quære.* Whether it can bestow upon it an authority, viz., that of committing for contempt, not incidental to it by law.

The principles of *Beaumont v. Barrett* (1) and *Burdett v. Abbot* (2) examined.

THIS was an appeal from the Supreme Court of Judicature of Newfoundland, upon a judgment on demurrer, pronounced on the 29th of December, 1838, in an action brought by the appellant against the respondent, for assault, battery, and false imprisonment.

The appellant was the district surgeon and manager of the Hospital in Saint John's Town, the capital of Newfoundland. The respondent, John Kent, was a member of the House of Assembly of Newfoundland, and, in his place in the House, had made some animadversions on the management of the Hospital.

On the 6th of August, 1838, Kent reported to the \*House of Assembly that the appellant had been guilty of a contempt, having reproached him in gross and threatening language for the observations he had made, adding, "your privilege shall not protect you." The House immediately referred the consideration of Mr. Kent's complaint to a Committee of Privileges, before whom evidence as to the alleged breach of privilege was taken, and the House, upon their report, voted the appellant guilty of a breach of the privileges of the House of Assembly, which, if passed unnoticed, would be a sufficient cause for deterring a member from acting with that independent conduct necessary for every Assembly, and ordered that the Speaker do issue his warrant to the Serjeant-at-Arms, to bring the appellant to the Bar of the House, to be dealt with according to the pleasure of the House.

[ \*64 ]

The appellant was accordingly arrested, and on the following day, the 7th of August, brought to the Bar of the House, where the respondent, William Carson, the Speaker of the House of Assembly, read to him the resolution, which declared his conduct to the respondent, Kent, to be a breach of privilege, and required him to explain. The appellant, it appeared, instead of explaining his conduct, made use of violent language towards Mr. Kent, who was then in his place in the House; and the House thereupon directed him to withdraw, in the custody of the Serjeant-at-Arms.

(1) 1 Moore, P. C. 59.

(2) 12 R. R. 450 (14 East, 1, 137).

KIELLEY  
v.  
CARSON.

The House then resolved, that such conduct was a grievous aggravation and iteration of the contempt offered to the House by the appellant, and directed that he should continue in the custody of the Serjeant-at-Arms until further order from the House. On the 9th of August the House resolved that the appellant should again be brought to their Bar, and that he

[ \*65 ]

\*should be required to apologize for the breach of privilege of which he had been guilty. The appellant was accordingly placed at the Bar, but he refused to make an apology. The House thereupon passed a resolution that he should be committed to the gaol of Saint John's, and ordered the Speaker to make out the necessary warrants to the sheriff and the gaoler, which was done, and the appellant was committed thereon.

The appellant was brought up, on the 10th of August, under a writ of *habeas corpus*, before one of the Judges of the Supreme Court, and discharged.

In consequence of this commitment and imprisonment, the appellant, in Michaelmas Term, 1838, brought an action of trespass and false imprisonment, in the Supreme Court of the island, against the respondent Carson, the Speaker, and Walsh the messenger, and Kent and others, members of the House of Assembly. The declaration consisted of four counts. The first count was for breaking and entering the plaintiff's dwelling-house on the 6th of August, and seizing and imprisoning him, for the space of four days. The third count was for assaulting and imprisoning him generally; and the second and fourth counts were for the battery.

The respondent, Carson, pleaded, first, the general issue, and, secondly, a special justification, as member and Speaker of the House of Assembly, and set forth the circumstances, above-mentioned, and the several resolutions of the House of Assembly, in obedience to which, he averred he had acted.

Similar pleas were put in by the other respondents.

[ \*66 ]

To these special pleas by Carson, as well as by the other respondents, the appellant demurred. The \*respondents having joined to the demurrers, they were argued before the Supreme Court, which held them to be sufficient in law, and directed judgment to be entered up for the defendants.

From this judgment, the present appeal was brought, which now came on for argument(1).

(1) Present: Lord Brougham, the Vice-Chancellor, Mr. Justice Erskine, and the Right Hon. Dr. Lushington.

*Mr. Pemberton, Q.C., and Mr. Henderson, for the appellant :*

KIELLEY  
v.  
CARSON.  
1841.  
Jan. 4, 5, 6.

The question now before your Lordships is of great magnitude, involving the liberty of the subject in the Colonies. Three points are raised by this appeal: First, whether the House of Assembly of Newfoundland had power to commit for a breach of privilege, as incident to the House as a legislative body; secondly, supposing such power to exist, whether it has been rightly exercised in this instance; and, lastly, whether the pleas contain a complete justification to the action. Now we contend, first, that the House of Assembly does not possess, by any law, the power of arresting and imprisoning for breaches of privilege; and, even supposing such power to exist, we submit that it can only be exercised against its own members, and not against strangers for alleged contempts committed out of doors. The first consideration arises out of the known distinction between conquered and settled Colonies: *Blankard v. Galdy* (1), *Campbell v. Hall* (2). In the former, the power of the Crown is paramount; in the latter, the Colonists carry with them the laws of their native land, and whatever difference of opinion there may be with \*respect to the introduction of some of those laws, the right of exemption from personal violence, by any authority, but that of the law, is clear and undoubted. "No man shall be imprisoned but by the lawful judgment of his peers, or by the law of the land" (3), is the great charter of liberty, applicable alike to Colonists as to Englishmen.

[ \*67 ]

It is necessary in the first instance to ascertain the powers of the House of Assembly. Newfoundland is one of the earliest of our Colonies, it is a dependency of the Crown of England, by right of occupancy. Possession was taken in the year 1583, when the laws of England were introduced, and amongst them, freedom from personal violence, and continued in force, without alteration, down to the year 1832. In that year, the present Legislative Assembly was constituted by letters patent from the Crown, to the Governor, authorizing him to convoke a Legislative Assembly for the island, to consist of fifteen members. The qualification and method of the election of its members were regulated by a Proclamation of the Crown, of the 26th of July, 1832. Previous to this period the sole power of making laws for the government of Newfoundland, was in the Legislature of this country. Any law, custom or usage for the justification of the act now complained of, has existed therefore,

(1) 2 Salk. 411.

(2) 20 State Trials, 239.

(3) Magna Charta, and see 28 Edw. III. c. 3.

KIELLEY  
v.  
CARSON.

[ \*68 ]

only, since the year 1832. It is attempted to support this privilege of committing for contempt, by analogy between the House of Commons and this Colonial Assembly. No such analogy exists. The House of Commons possess the power of commitment as part of the *lex et consuetudo parliamenti*. In Coke's 4th Institute, 15, it is laid down that matters of Parliament are not to be decided by the common \*laws, but *secundum legem et consuetudinem parliamenti*.

[ 69 ]

The same doctrine is stated in 3 Hawkins, P. C., book 2, c. 15, s. 73, and by Blackstone, 1 Com. 164. It is monstrous to suppose for an instant, that there can be a *lex et consuetudo* of an Assembly like Newfoundland, whose Constitution existed only since 1832. The principles on which the English Parliament rests its rights and privileges cannot be extended to Colonial Assemblies. Their Constitutions necessarily differ. Colonial Assemblies derive their powers from the Crown, and are regulated by their respective charters. Parliament stands on its own laws, the *lex et consuetudo parliamenti*, which are founded on precedents and immemorial usage. The Crown has no power, by virtue of its prerogative, to confer on the Legislative Assembly such powers as are possessed by the House of Commons, for it does not possess such authority itself. [They cited Lord ELLENBOROUGH, Ch. J., in *Burdett v. Abbot* (1).] The House of Commons possess this power as a court of judicature, Coke's 4th Inst. 23; as part of the High Court of Parliament, the *aula regia*. After the separation of the legislative body into two distinct Houses, each retained, to this extent, at least, the power that was common to both, and this power has been recognized at an early period, confirmed by the highest authorities, sanctioned by unvarying usage, and recognized by Acts of Parliament. The question, whenever the privileges of the Commons have been disputed, has always been, whether the particular act was justified or not, by the *lex et consuetudo parliamenti*. Is the House of Assembly of Newfoundland a court of justice? Certainly not. [Nor could the Crown give it any such power as claimed.]

[ \*71 ]

The \*East India Company possessing legislative powers over a territory more vast than our House of Commons, has not such a power. The Corporation of the City of London has no such power. There are only two instances of such a power, namely, the House of Commons and the Courts of Justice. *Beaumont v. Barrett* (2) is the only authority which can be cited on the other side. \* \* The course adopted to justify the claim made here, has been to refer to

[ 72 ]

(1) 12 R. B. 457 (14 East, 136).

(2) 1 Moore, P. C. 59.

instances of the exercise of a similar power by other Houses of Assembly. Precedents have been brought forward from the Journals of the \*Houses of Assembly of Barbadoes, Antigua, Montserrat, the Bahamas, Nova Scotia, New Brunswick, and Prince Edward's Island (1). The earliest period of the exercise of this power by any of these bodies was by the House of Assembly of Prince Edward's Island, in the year 1812. Barbadoes was founded in the year 1649, but the first instance of the exercise of this power by the Assembly is in 1821. If the power of committal existed as a necessary incident to the House of Assembly from 1649, how came it that it was never exercised till 1821? With respect to Antigua, that Colony was settled in 1681, but no instance of committal for contempt could be found till 1819, and that was against a member of the House of Assembly. In Montserrat, there was no instance of committal of a person who did not appear to be a member of the House. In Nova Scotia, the earliest instance was in 1818, and in New Brunswick in 1832. But the usage in one Colony, even if it existed, is no authority for the power being in another. If the doctrine in *Beaumont v. Barrett* is to be applied, the power is just as incident to the Council composed of three persons, as the whole Legislative Assembly.

KIELLEY  
v.  
CARSON.  
[ \*73 ]

II. The mode in which this supposed right has been exercised. The whole proceedings were irregular. The appellant was taken into custody without being summoned, and convicted without being heard, or the deposition of a single witness taken on oath. \* \* \*

III. The plea is no justification. The rule of law is that the plea must justify the act complained of: *Gregory v. Hill* (2), *Duppa v. Maya* (3), *Smith v. Nicholls* (4), *Greene v. Jones* (5). The judgment complained of must fail, even on this ground of objection. \*The pleas are bad, as they purport to justify without confessing a battery.

[ 74 ]

[ \*75 ]

*Mr. M. D. Hill, Q.C., and Mr. Fleming, for the respondents :*

I. The power of committal for a violation of privilege is necessarily inherent in every Legislative Assembly: *Beaumont v. Barrett*.  
\* \* We admit the argument of the appellant, that English

(1) These precedents were printed in a supplemental appendix.

(2) 8 T. R. 299.

(3) 1 Saunders, 286, n.

(4) 50 R. R. 658 (5 Bing. N. C. 208); S. C. 7 Scott, 147.

(5) 1 Saunders, 297.

KIELLEY  
v.  
CARSON.

settlers carry with them their rights according to the English law, varied only by local circumstances. They have, as a consequence, the right to Courts of Justice for the purpose of administering the law, and it cannot be questioned that those Courts have the same power of committing for contempt as the Courts of England. Settled Colonies have a right to a Legislature *ex necessitate*; for

[ \*76 ] Acts passed in the mother \*country subsequently to the settlement do not bind the Colony unless the Colony is expressly named. As a Colony, therefore, requires new laws, it follows that it has a right to a Legislative Assembly, and one as like to the Houses of Parliament as circumstances admit. \* \* The Act of 1832 established the present House of Assembly; but it was not a new institution—it had been in action for centuries; its powers known and its attributes settled by long experience. \*The question, then, is narrowed, to what are the incidents of a General Assembly. In Mr. Burke's account of European America (1), it is said that the first Colony which was settled was that of Virginia, which was governed at first by a President and Council appointed by the Crown. The Colonists were, however, afterwards "empowered to elect representatives for the several counties in which the province is divided, with privileges resembling those of the House of Commons in England." Again, in Edwards' History of the West Indies (2), a work of considerable reputation, it is laid down "that Provincial Parliaments or Colonial Assemblies being thus established and recognized, we shall find that in their formation, mode of proceeding, and extent of jurisdiction within their own circle, they have constantly copied, and are required to copy, as nearly as circumstances will permit, the example of the Parliament of Great Britain." He goes on further to say, "They commit for contempts; and the Courts of Law have refused, after solemn argument, to discharge persons committed by the Speaker's warrant." Now, this authority to commit for contempt has been invariably exercised by all the Colonial Houses of Assembly whenever they may have been called upon to exercise it. It does not rest merely upon principle. In the American Archives in the course of printing, by the order of the Congress (3), under the date of the year 1775, the Journals of the House of Assembly in New Jersey, one Murdock was committed by the House for contempt, in sending a challenge to one of the members. Another case—that of Cook and

(1) 2 Vol. 296—297.

(3) Vol. I. p. 1119—1120, Brit. Mus.

(2) 2 Vol. 344.

*Macnaughten*—occurred \*in Jamaica in 1776 (1), of a committal for contempt by the House of Assembly. The powers possessed and exercised by the Houses of Assembly in the West Indies have been equally enjoyed by similar bodies in whatever Colonies they were erected. The extracts from the Journals of the Houses of Assemblies of New Brunswick, Nova Scotia, and of Prince Edward's Island, which are printed in the Supplemental Appendix, prove the exercise of the same authority by the Legislative Assemblies in those Colonies. Evidence of usage cannot be stronger or more conclusive. The precedents of the exercise of the power to commit in the Colonies are not numerous, but they are satisfactory. \* \* The whole of the authorities upon this point are collected in *Stockdale v. Hansard* (2). The case of *Anderson v. Dunn* (3) was a commitment by the Congress of a stranger for contempt. By the American Constitution, the Congress have no power but that specially delegated to it, the residuum of power remaining in the separate Sovereign States. By that Constitution, power to arrest and commit for contempt was expressly given to it over its members, but no such power was given over strangers: yet it was held in *Anderson v. Dunn*, that such power was necessary and incident to the functions of Congress. No Act of Parliament ever gave the House of Assembly of Jamaica the power to commit, yet they exercised the power as being inherent in the supreme legislative authority: *Beaumont v. Barrett*; *Burdett v. Abbot*. An attempt, however, has been made to distinguish *Beaumont v. Barrett* from the present case, by reason that Jamaica was a conquered Colony, and Newfoundland a settled Colony. This objection is untenable. It has been expressly held by Lord MANSFIELD, in *Hall v. Campbell* (4), that Jamaica was not a conquered Colony. \* \* A House of Assembly cannot perform its functions without the same powers as the House of Commons; and from the tenor of the Royal instructions (5) to the Governor of Newfoundland accompanying the Commission, it was manifestly the intention of the Crown to confer similar powers upon the House of Assembly.

II. This power has been well exercised. If only irregularly exercised, the objections urged are of no weight, \*because each Court judges of its own proceedings. \* \* \*

KIELLEY  
v.  
CARSON.  
[ \*78 ]

[ 79 ]

[ 80 ]

[ \*81 ]

(1) 2 Edwards' Hist. of West Indies, 422.

(2) 48 R. R. 326 (9 Ad. & El. 1).

(3) Wheaton, 204, N. S.

(4) Cowper, 213; S. C. Loft, 655; 20 State Trials, 326—327.

(5) Clark's Colonial Law, 435.



KIELLEY  
v.  
CARSON.  
[ 82 ]

III. The point of pleading is subordinate to the important point really at issue. If the pleadings are insufficient, why was not such objection taken in the Court below? where, if sustained, we should have moved to amend.

*Mr. Pemberton* replied.

1842.  
May 23.

The appeal was, by the direction of their Lordships, re-argued by one counsel on each side; by

*Mr. Henderson*, for the appellant, and

*Mr. M. D. Hill*, Q.C., for the respondent.

[ \*83 ]

In addition to the authorities referred to in the previous argument, *Calvin's* case (1); 2 Halliburton's History of Nova Scotia, p. 324; Gordon's History of New Jersey, 337; Pownall's History of the Colonies, p. 60; Woodstock's Constitution of the British Colonies, p. 141; The Commission for establishing a Legislative Assembly in Newfoundland, 26th July, 1832, and the instructions \*from the Colonial Office thereon; Clark's Colonial Law, p. 435; and the case of *Upper Canada*, Parliamentary Papers, 1828,—were cited and relied upon.

1843.  
Jan. 11.

PARKE, B.:

The great importance of the principal question in this case induced those of their Lordships who heard the first argument, to request that a second might take place before themselves and other members of the Judicial Committee. The case has been again argued before the Lord Chancellor, the Lords Brougham, Denman, Abinger, Cottenham, and Campbell, the Vice-Chancellor of England, the Lord Chief Justice of the Common Pleas, Mr. Justice Erskine, the Right Hon. Dr. Lushington, and myself; and I have been instructed by their Lordships to state the reasons for the advice which they will give to her Majesty to reverse the judgment of the Court below.

That judgment was given in favour of the defendant, upon a demurrer to several special pleas to an action of trespass for false imprisonment, by which the acts complained of were justified by the defendant Carson, as Speaker of the House of Assembly of Newfoundland, by other defendants as members of that House, and by one as messenger in aid of the Serjeant-at-Arms, upon

an arrest and commitment for an alleged breach of privilege of the House.

KIELLEY  
v.  
CARSON.

Several objections were taken of a formal nature to these pleas, which it is unnecessary to state, as the opinion of their Lordships is not founded upon any of those objections. The main question raised by the pleadings, and applying equally to the case of all the defendants, was whether the House of Assembly had the power to arrest and bring before them, with a view \*to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly—in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a complaint of contempt or breach of privilege. It is indeed stated in the plea of the defendant Carson, and that of the other defendants, members of the House, that something occurred which might amount to a contempt, committed in the face of the Assembly, by the use of the violent and threatening words to one of the members then present in his place; but each plea also justified the original arrest of the plaintiff below upon a warrant issued by the Speaker, founded on the complaint of a breach of privilege committed out of the House: and if the House of Assembly had not a power to issue that warrant, this part of such plea is bad; and, as each plea is entire, the whole is bad. The question, therefore, whether the House of Assembly could commit by way of punishment for a contempt, in the face of it, does not arise in this case.

[ \*84 ]

Their Lordships are of opinion that the House of Assembly did not possess the power of arrest with a view to adjudication on a complaint of contempt committed out of its doors, and consequently that the judgment of the Court below must be reversed.

In order to determine this question, and to ascertain what the legal powers of the Assembly were, it is proper to consider first, under what circumstances it was constituted, and what was the legal origin of its powers.

Newfoundland is a settled, not a conquered Colony, and to such Colony there is no doubt that the settlers from the mother-country carried with them such portion \*of its Common and Statute Law as was applicable to their new situation, and also the rights and immunities of British subjects. Their descendants have, on the one hand, the same laws, and the same rights (unless they have been altered by Parliament); and, on the other hand, the Crown

[ \*85 ]

KIELLEY  
v.  
CARSON.

possesses the same prerogative and the same powers of government that it does over its other subjects: nor has it been disputed in the argument before us, and, therefore, we consider it as conceded, that the Sovereign had not merely the right of appointing such magistrates and establishing such corporations and Courts of Justice as he might do by the common law at home, but also that of creating a local Legislative Assembly, with authority, subordinate indeed to that of Parliament, but supreme within the limits of the Colony, for the government of its inhabitants. This latter power was exercised by the Crown in favour of the inhabitants of Newfoundland in the year 1832, by a Commission under the Great Seal, with accompanying instructions from the Secretary of State for the Colonial Department; and the whole question resolves itself into this,—whether this power of adjudication upon, and committing for, a contempt, was by virtue of the Commission and the instructions legally given to the new Legislative Assembly of Newfoundland. For under these alone can it have any existence, there being no usage or custom to support the exercise of any power whatever.

In order to determine that question, we must first consider whether the Crown did in this case invest the local Legislature with such a privilege. If it did, a further question would arise, whether it had a power to do so by law.

[ \*86 ]

If that power was incident as an essential attribute \*to a Legislative Assembly of a dependency of the British Crown, the concession on both sides that the Crown had a right to establish such an Assembly, puts an end to the case. But if it is not a legal incident, then it was not conferred on the Colonial Assembly, unless the Crown had authority to give such a power, and actually did give it.

Their Lordships give no opinion upon the important question whether, in a settled country such as Newfoundland, the Crown could by its prerogative, besides creating the Legislative Assembly, expressly bestow upon it an authority, not incidental to it, of committing for a contempt—an authority, materially interfering with the liberty of the subject, and much liable to abuse. They do not enter upon that question, because they are of opinion, upon the construction of the Commission and of its accompanying document, that no such authority was meant to be communicated to the Legislative Assembly of Newfoundland; and if it did not pass as an incident, by the creation of such a body, it was not granted at all. This appears to be clear from the consideration of the instruments.

By the Commission for the establishing the Legislative Assembly, dated the 26th July, 1832, his late Majesty King William the Fourth authorized the Governor, with the advice and consent of the Council of the island, from time to time, to summon and call General Assemblies of the freeholders and householders within the island, in such manner and form, and according to such powers, instructions and authorities as were granted or appointed by the general instructions accompanying the Commission, or according to such further powers, instructions or authorities as should at any time thereafter be granted or appointed under his \*Majesty's sign manual and signet, or Order in Council, and that the persons thereupon duly elected should take the oaths, and should be called, and declared the General Assembly of the island of Newfoundland; and the Governor, with the advice and consent of the Council and Assembly, or the major part of them respectively, should have full power to make, constitute and ordain laws, statutes and ordinances for the public peace, welfare and good government of the island and its dependencies, and the people and inhabitants thereof, and such other as should resort thereto, which laws, &c. were to be as near as might be to the laws and statutes of the United Kingdom, and subject to the approbation of his Majesty and to the negative voice of the Governor.

KIELLEY  
C.  
CARSON.

[ \*87 ]

Accompanying this Commission was a despatch from Viscount Goderich (now Earl of Ripon), containing instructions (1) to the Governor for the regulation of his conduct, upon which some reliance was placed on the argument at the Bar, as affording evidence of the intention of the Crown to confer the power in question upon the House of Assembly. The Commission itself where such an authority would naturally be expected to be found if the Crown had intended to confer it, is entirely silent upon this subject, nor does it grant any of the privileges of the British Parliament; and the terms used by the Earl of Ripon's letter have probably reference to the mode of conducting business and the forms of procedure, which are to be assimilated to those of the British House of Commons—at all events, terms so vague and general could never have been used with the intention of giving the powers of commitment, and other privileges of so important a nature, \*if the authority of the Crown was required to bestow them by a special grant.

[ \*88 ]

The whole question then is reduced to this,—whether by law,

(1) See Clark's Colonial Law, 435.

KIELLEY  
v.  
CARSON.

the power of committing for a contempt, not in the presence of the Assembly, is incident to every local Legislature.

The Statute Law on this subject being silent, the common law is to govern it; and what is the common law depends upon principle and precedent.

Their Lordships see no reason to think, that in the principle of the common law, any other powers are given them, than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute. These powers are granted by the very act of its establishment, an act which on both sides, it is admitted, it was competent for the Crown to perform. This is the principle which governs all legal incidents. "*Quando Lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest.*" In conformity to this principle we feel no doubt that such an Assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt, to secure the free exercise of their legislative functions, they are justified in acting by the principle of the common law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions by a local Legislature, whether representative or not.

[ \*89 ] \*All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions.

These powers certainly do not exist in corporate or other bodies, assembled, with authority, to make bye-laws for the government of particular trades, or united numbers of individuals. The functions of a Colonial Legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question.

It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs as a legal incident, by the common law, to an Assembly with analogous functions. But the reason why the House of Commons has this power, is not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription; the *lex et consuetudo Parliamenti*, which

forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And, besides, this argument from analogy would prove too much, since it would be equally available in favour of the assumption by the Council of the island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly—a claim for which there is not any colour of foundation.

KIELLEY  
v.  
CARSON.

Nor can the power be said to be incident to the Legislative Assembly by analogy to the English Courts \*of Record which possess it. This Assembly is no court of record, nor has it any judicial functions whatever; and it is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority, in this respect, rests upon ancient usage.

[ \*90 ]

Their Lordships, therefore, are of opinion, that the principle of the common law, that things necessary, pass as incident, does not give the power contended for by the respondents as an incident to, and included in, the grant of a subordinate Legislature.

It was however argued that in other Colonies, the Legislative Assemblies exercise the power of committing for breach of privilege without objection, and that the usage in this respect was good evidence that such power was an incident attached by the common law, though not on the ground of necessity. And no doubt this argument would have had much weight, if there had been many Legislatures situate precisely as this is, and the usage to exercise the power of committal for breach of privilege had been frequent, and the acquiescence in its exercise long and universal, and that usage could have been explained only on the ground that the power was a legal incident. But no such usage has been proved, and the constitution and practice of different Colonies, and the prerogative of the Crown with reference to that, differ so much, that there is very little analogy between them, and no inference can safely be deduced from the law, as understood, in one, to guide us with respect to another. In some, the very exercise of the power, with the sanction of the \*tribunals, and the acquiescence of the public for a long period of time, may raise a presumption that the power has been duly communicated by law. But in this case, we have the

[ \*91 ]

KIELLEY  
v.  
CARSON.

simple question to decide, without any usage, any acquiescence, or any sanction of the courts of law, except in the very case in which we are now called upon to affirm or reverse the judgment of the Court below. It remains to be considered how the question stands on express authority; and unless there be that satisfactory authority expressly in favour of the power, we must hold that the common law does not confer it.

There is no decision of a court of justice, nor other authority, in favour of the right, except that of the case of *Beaumont v. Barrett*, decided by the Judicial Committee, the members present being Lord Brougham, Mr. Justice Bosanquet, Mr. Justice Erskine, and myself. Their Lordships do not consider that case as one by which they ought to be bound on deciding the present question. The opinion of their Lordships, delivered by myself, immediately after the argument was closed, though it clearly expressed that the power was incidental to every Legislative Assembly, was not the only ground on which that judgment was rested, and, therefore, was in some degree extrajudicial; but besides, it was stated to be and was founded entirely on the *dictum* of Lord ELLENBOROUGH in *Burdett v. Abbot* (1), which *dictum* we all think cannot be taken as an authority for the abstract proposition, that every legislative body has the power of committing for contempt. The observation was made by his Lordship, with reference to the peculiar powers of Parliament, and ought not, we all think, to be extended any further.

[ \*92 ]

We all, therefore, think that the opinion expressed \*by myself in the case of *Beaumont v. Barrett* ought not to affect our decision in the present case, and there being no other authority on the subject, we decide according to the principle of the common law, that the House of Assembly have not the power contended for. They are a local Legislature, with every power reasonably necessary for the proper exercise of their functions and duties, but they have not what they have erroneously supposed themselves to possess—the same exclusive privileges which the ancient law of England has annexed to the House of Parliament.

The judgment will be reversed, and there must be a writ of inquiry of damages, unless the parties can agree among themselves upon some sum—they had better do that. They ought to consider that it was a mere question of right to be tried, and, therefore, probably they will be able to do that. All we can do is to remit the record back to the Court below for

ON APPEAL FROM THE ARCHES COURT OF CANTERBURY (1).

THE REV. THOMAS SWEET ESCOTT *v.*

FREDERICK GEORGE MASTIN (2).

(4 Moore, P. C. 104—140.)

1842.  
June 23, 24.Lord  
BROUGHAM.

[ 104 ]

A child baptised with water in the name of the Trinity, by a layman (a Wesleyan Methodist) not authorised to administer the rite of baptism: Held not to be "unbaptised" within the meaning of the rubric for the burial of the dead in the Common Prayer Book, as incorporated into the Uniformity Act, 13 & 14 Car. II. c. 4.

A clergyman of the Church of England having refused to perform the office of interment, after due notice of the death, of a parishioner so baptised, suspended from the ministry for three months, under the 68th Canon of 1603.

Construction of the rubrics of the Common Prayer Books of the years 1603 and 1661: Held to be cumulative and not substitutionary, of the rubric in force anterior to 1603, and not to affect the validity of lay baptism.

THIS was an appeal from the Arches Court of Canterbury, in a suit of the office of Judge, promoted by the respondent, a parishioner and inhabitant of the parish of Gedney, in the county and diocese of Lincoln, against the appellant, a minister of the Church of England, and vicar of Gedney, for refusing to bury the corpse of Elizabeth Ann Cliff, the infant daughter of Thomas Cliff and Sarah his wife.

The proceedings commenced in the Arches Court of Canterbury, by virtue of letters of request from the Chancellor of the Diocese of Lincoln.

[The appellant had refused to bury the corpse in question on the ground that the infant had been baptized by a Wesleyan minister. He maintained that baptism by a person not in orders was not recognized by the Church of England.]

The Judge of the Arches Court, by his decree, bearing date the 8th of May, 1841 (s), pronounced in favour of the promovent, and declared that the Reverend T. S. Escott, clerk, (the appellant,) had acted contrary to law, in refusing to bury the corpse of Elizabeth Ann Cliff, spinster; and that he had thereby incurred the penalties of the 68th Canon, in that case made and provided, and he ordered him to be suspended for the space of three months from the time of the publishing of the said suspension.

[ 112 ]

(1) Present: Lord Wynford, Lord Brougham, Mr. Justice Erskine, and the Right Honourable Dr. Lushington.

L. R. 2 Ad. & El. 116, 197; *Jenkins v. Cook* (1875) L. R. 4 Ad. & El. p. 489.

(3) Reported; 2 Curteis, Ecc. Rep. 692.

(1868)



ESCOTT  
r.  
MASTIN.

The present appeal was brought from that decision.

\* \* \* \* \*

*Dr. Phillimore and Dr. Harding* in support of this objection.

[ 114 ]      The *Queen's Advocate* (*Sir John Dodson*), and *Mr. F. Kelly*,  
Q.C., *contra*.

[ 116 ]      [After argument on a preliminary objection to the competence of  
certain witnesses,] their Lordships directed the appeal to be argued  
on the merits, reserving their opinion upon this objection, until  
their final judgment was pronounced. Accordingly,

*Dr. Phillimore and Dr. Harding* for the appellant, and

The *Queen's Advocate* (*Sir John Dodson*) and *Mr. F. Kelly*,  
Q.C., (with whom were *Dr. Haggard* and *Mr. Matthews*,) were  
heard for the respondent.

\* \* \* \* \*

[ 117 ]      The following authorities and works were cited: *Andrews v.*  
*Cawthorne* (1), *Rex v. Coleridge* (2), *Kemp v. Wickes* (3); 4 Geo. IV.  
c. 52 (forbidding the burial service being said over suicides);  
*Attorney-General v. Pearson* (4); 1 Gib. Codex Juris Ecc. 367,  
537—538; 2 Gib. Cod. Jur. Ecc. 1481; Lyndwood, 278; Jeremy  
Taylor's *Ductor Dubitantium*, B. iii. c. iv. Rule 15; the Acts of  
Uniformity of Edw. VI., and Eliz.; Common Prayer Book of  
Elizabeth's time (as to the form of baptism to be observed in  
private houses); Wheatley on Common Prayer, 357—359; Con-  
vocation in 1575 (6 Collier's Church History, 561); Hampton  
Court Conferences (7 Collier's Church History, \*273, 298, 301);  
[ \*118 ] Rubric confirmed by 13 & 14 Car. II. c. 4, ss. 1, 2); 1 Burns'  
Ecc. Law, p. 115 (on private baptism and lay baptism); Calvin's  
Institution of the Christian Religion (b. 4, c. 15, s. 20); 1 Quick's  
Synodicum, in *Galliâ Reformatâ introductia*, p. 46, and Chap. vi.  
s. 13.

[Counsel for the respondent] cited and relied upon the Hamp-  
ton Court Conferences, 1549—52; the Liturgy as corrected in  
Edward VI.'s time; Cardwell's Synodicum, 337, 341; Johnson's  
Ecc. Laws; Cardwell's two Liturgies, *temp.* Edw. VI., pp. 337—338,  
341; Cardwell's Hist. of Conferences on the Common Prayer,

(1) Willes, Rep. 536.

(3) 3 Phill. 264.

(2) 21 R. R. 498 (2 B. & Ald. 806).

(4) 17 R. R. 100 (3 Mer. 353, 405).

p. 131—138; Barlow's Hist. of Confer. on C. P., *ib.*, pp. 172—174, 356; Burnet's Hist. of his own Times, fo. ed. vol. 2, pp. 603—605; Watson's Clergyman's Law, ed. 1713, p. 318, ch. 31; Bingham's Scholastic History of Lay Baptism, p. 1, ch. 3, sec. 5; Ayliffe's Parergon, p. 102; Palmer's Antiquities of the English Ritual, ch. 5, s. 9; \*Life of Archbishop Sharp, ed. by Newcomb, vol. i. 369, 375; Archbishop Sharp on the Rubric, 33. The Act 48 Geo. III. c. 75 (providing for the burial of persons whose bodies are driven on shore). They commented also on the 12th Canon of 1575, (against private baptism,) which however appeared not to have been confirmed by convocation, or adopted by the Church. Gib. Cod. vol. i., pp. 367—369. Bishop Wilkin's Concilia Magnæ Britanniae et Hiberniae, 135, and note (a); *Lawrence's case*, pub. A.D. 1709; Fleetwood's Judgment of the Church of England on Lay Baptism, pp. 318—319; Waterland's Works, ed. by Van Mildert, B. of Durham, 10 vol. p. 185; Opinions of Archbishop Tennison, A.D. 1712, 1 Sharp's Life; Talbot, Bishop of Oxford's, Charge to the Church of Geneva, pp. 13, 14; Hooker's Ecc. Polity, Book v., s. 62; 1 Documentary Annals of the Church, by Cardwell, 206; statutes 1 W. & M. c. 18, ss. 10—13; 6 & 7 Will. III. c. 6; 19 Geo. III. c. 44; 48 Geo. III. c. 75; 3 & 4 Vict. c. 92.

ESCOOTT  
\*  
MARTIN.

[ \*119 ]

#### LORD BROUGHAM :

An objection was, in opening this case, taken, and for the first time taken here, to three of the witnesses. [After disposing of this objection his Lordship proceeded:]

The ground is thus cleared for examining the main \*question between the parties: and this resolves itself into the construction of the Rubric to the Burial Service. The 68th Canon is clear and distinct, attaching the penalty of suspension to a refusal of that office in any case except one,—that of a person having been “denounced, excommunicated *majori excommunicatione*, for some grievous and notorious crime, and no man able to testify of his repentance.” But the Act of Uniformity, 13 & 14 Car. II. cap. 4, having incorporated, as part of its provisions, the office for the Burial of the Dead, and the Rubric for that office forbidding the use of it for such as die unbaptised, it will be a sufficient defence to the charge, under the 68th Canon, if the child died unbaptised. The whole question, therefore, is reduced to this,—does baptism, by a person not in holy orders, possess the character of that sacrament according to the laws of the Church?—in other words, can any one,

1842.  
July 2.

[ 121 ]

[ \*122 ]

ESCOTT  
v.  
MASTIN.

other than a person episcopally ordained, baptise so that the ceremony may be effectual as baptismal, though the performing it may be irregular, and even censurable? Is the solemnity performed by a layman, sprinkling with water, in the name of the Trinity, valid as baptism in the view of the Church, although the Church may greatly disapprove of such lay interference without necessity, as she disapproves even of an ordained person performing the ceremony in a private house without necessity, and yet never scruples to recognise the rite so performed as valid and effectual? Nothing turns upon any suggestion of heresy or schism; the alleged disqualification is the want of holy orders in the person administering the solemnity, and it is as unqualified and not as heretical and schismatical—heretic without, or schismatic \*within the pale of the Church—that any one's competency to administer it, is denied.

[ \*123 ]

The 68th Canon being that upon which this proceeding is grounded, it is necessary to consider what the law was at the date of the canon, the year 1603. Without distinctly ascertaining this, we cannot satisfactorily determine what change the Rubric of 1661, adopted into the 13 & 14 Car. II. cap. 4, made, and in what state it left the law on this head; because it is very possible, that the same enactment of a statute, or the same direction in a Rubric, bearing one meaning, may receive one construction when it deals for the first time with a given subject-matter, and have another meaning and construction when it deals with a matter that has already been made the subject of enactment or direction; and this is most specially the case where the posterior enactment or direction deals with the matter without making any reference to the prior enactment or direction. Still more is it necessary to note the original state of the law, when it is the common law that comes in question, as well as the statute.

The Book of Common Prayer was adopted and prescribed by the statute of 2 & 3 Edw. VI., cap. 1, and more fully by the 5 & 6 Edw. VI., cap. 1, which the 1 Elizabeth, cap. 2, revived, after it had been repealed by the 1 Mary, s. 2, cap. 2; and it was further prescribed and enforced by the same Act of Elizabeth, and by another made in the eighth year of her reign (8 Elizabeth, cap. 1, sec. 3). It is certain, then, that the Liturgy established during the interval between the first and the last of these statutes,—that is between 1548 and 1565,—was in force by statutory authority down to the year 1603, (sometimes \*called

[ \*124 ]

1603 and sometimes 1604, which is owing to the style, the date, if I recollect, being January,) when the canons in question were made, no alteration whatever having been effected during the interval. It is equally certain, that no authority existed to make any alteration inconsistent with statutory provisions, during that interval; and this consideration seems to dispose of the question which has been argued both below and here, upon the 12th Canon of 1575. That canon is to be taken either as professing to make an alteration of the Rubric which the statute had sanctioned, in which case it can have no force, or as declaratory of the sense of the Rubric; but neither would any such declaration be binding, because the Legislature having adopted the Rubric, and made it parcel of a statute, no other authority than a declaratory Act can give it a new meaning; add to which, that the plain intendment of the Rubric appears to have been adhered to, after and notwithstanding the canon of 1575, and not the sense which that canon seems to give the Rubric, and which we must indeed admit that canon purports to give it. The canon of 1575 appears never to have excited any attention, and if it ever received the Royal assent, (which is doubtful,) it certainly was not cited on either side during the controversy on the subject of baptism at the Hampton Court Conferences.

ESCOTT  
r.  
MASTIN.

We are, therefore, to see what the Rubric prescribes at, and prior to, 1603,—this being the statutory provision then in force; and adopting the common law prevailing for 1,400 years over Christian Europe.

In the first place, no prohibition of the Burial Service for unbaptised persons, or indeed for any class of \*persons, is to be found in the Liturgies of Edward and of Elizabeth. The exception of unbaptised persons and suicides first occurs in the Rubric of 1661, and consequently first received the force of law from the Uniformity Act of 1662, after the Restoration—(the 13 & 14 Car. II. cap. 4). The statutes of Edward VI. and Elizabeth recognised the right of every person to burial with the Church Service; and the 68th Canon, enforcing the civil statutory right, only excepting persons excommunicate and impenitent. Unbaptised persons, therefore,—persons baptised in no way whatever,—would have had the right of burial according to the service of the Church, if they were not excluded by those portions of the service which appear to regard Christians alone. Those portions would probably exclude persons not Christians; but if an unbaptised person could be

[ \*125 ]

ESCOTT  
C.  
MASTIN.

regarded as a Christian, then would he not be excluded prior to the Rubric and statute of 1661 and 1662.

[ \*126 ]

But, secondly, and what is much more material to our present inquiry, it is clear that the Rubric, and consequently the statute, down to 1603, and indeed to 1662, the date of the Uniformity Act, authorised lay baptism, and placed it on the same footing with clerical baptism in point of efficacy. The Rubric, after setting forth that baptism ought to be administered publicly, and on Sundays and holydays, in order to approach as near as might be to the practice of the primitive Church, which confined it to Easter and Whitsuntide, nevertheless adds, that, if necessity require, children may at all times be baptised at home. A further warning is required to be given to the people against baptising privately, "without great cause and necessity," and this Rubric is retained in the subsequent \*forms of prayer down to the present time. The Rubrics of Edward and Elizabeth then proceed to lay down the rules for administering the baptismal sacrament when it is privately performed; and herein those Rubrics materially differ from the subsequent ones of 1603 and 1661. They require "them that be present to say the Lord's Prayer, if the time will suffer;" and the Rubrics add, "then one of them (that is, any one of them that be present) shall name the child, and dip him in water, or pour water upon him, saying these words, 'N., I baptise thee in the name of the Father, and of the Son, and of the Holy Ghost. Amen.'" We may observe, in passing, that there is contemplated a great hurry in the ceremony, because the expression is, "if the time will suffer." This of itself indicates that the circumstances are, or at least may be such, as to prevent the sending or the waiting for a minister. The Rubric goes on to declare the sufficiency of baptism so performed,—“And let them not doubt but that the child so baptised is lawfully and sufficiently baptised, and ought not to be baptised again in the church.” Nevertheless, the expediency is set forth of afterwards bringing the child to the church, and there presenting him to the minister, that it may be ascertained whether or not the ceremony had been lawfully performed. For this purpose, six questions are to be asked of them that bring the child: Who baptised it? Who was present? Whether they called on God for His grace? With what matter the child was baptised? With what words? And whether they think he was lawfully and perfectly baptised? If the answer to these questions prove that “all things were done

as they ought to be," then the minister is to say, "I certify you that in this case ye (not you, the minister, but \*ye, the people) have done well, and according to due order," and he declares the child to have been received into the number of the children of God, "by the law of regeneration in baptism," that is, by the sacrament previously administered in private. If, however, they which bring the child "make an uncertain answer, and say they cannot tell what they thought, said, or did, in that great fear and trouble of mind, as oftentimes it chanceth," then the child is to be baptised publicly, but, as it were conditionally or provisionally, with this reserve, that the minister shall say, "If thou be not baptised already." This portion of the Rubric is demonstrative, if the former part left any doubt, that the presence of a minister at the private ceremony was not contemplated; for, if it were, what they thought, or said, or did, would be immaterial; and what the minister said or did would have formed the only subject of inquiry; not to mention, that no fear or trouble of mind at the time of the ceremony could prevent those who bring the child from recollecting whether there had been a minister present or not. Indeed, the questions would have been differently framed, had the presence of a minister been as essential as the water and the words. It would have been asked, not merely "by whom, and in whose presence," but "was he baptised by a minister?" There can, therefore, be no doubt whatever, that, by these earlier Rubrics, the baptism is deemed valid if performed with water, and in the name of the Trinity, though by lay persons. Assuming, then, that there is no minister present, the Rubric declares the baptism to be without any doubt lawfully and sufficiently administered, though in private.

The same doctrine was held, and the practice formed \*upon it, in the Roman Catholic Church, from a very early period. It prevailed from the beginning of the third century, and though it formed the subject of controversy between the Eastern and Western Churches, during the succeeding period, it had become universally admitted by both, in the time of St. Austin, who flourished in the latter part of the fourth century. In England, as elsewhere, it was held valid. The Constitutions of Archbishop Peecham, in Lyndwood's Collection, bearing date A.D. 1281, though severely denouncing a layman who shall intrude himself into the office without necessity, yet declare the baptism valid which is celebrated by laymen, and state that it is not to be repeated. Whoever did so intrude, was denounced as guilty of "mortal sin;" nevertheless,

ESCOTT  
 "M.  
 MASTIN.  
 [ \*127 ]

[ \*128 ]

ESCOTT  
v.  
MASTIN.

his act was pronounced to be valid and sufficient, and that it was not necessary the ceremony should be repeated. Now, in all these positions, the necessity can make no kind of difference, unless in excusing the intrusion. If the rite can only be administered by clerical hands,—if it be wholly void when administered by a layman,—no necessity can give it validity. The consecration of the elements, for the purpose of giving the Eucharist to a dying person, may be as much a matter of urgent necessity, as the baptism of an infant in extremities; but, neither in the Roman Catholic, nor in the Reformed Church, was it ever supposed, that any extremity could dispense with the interposition of a priest, and enable laymen to administer the sacrament of the Lord's Supper.

[ \*129 ]

The position, therefore, being undeniable, that, previous to the year 1603, and at the time the 68th Canon was made, lay baptism, though discountenanced and even forbidden, unless in case of necessity, \*was yet valid if performed, and this being the common law,—not the law made by statute and Rubric, but by statute and Rubric plainly recognised and adopted,—we are to see if any change was made in that law as it thus stood.

In the Burial Service, the Rubric of 1603 made no change, but that of 1661 forbad the Burial Service in cases of suicide, excommunication, and persons unbaptised. A right formerly existing was thus taken away, at least in some cases. This makes it fit that we construe the word “unbaptised” strictly, or, which is the same thing, that we give a large construction to “baptised.” And, after the change in the Burial Service, it becomes the more necessary to see that there is a clear and undoubted change in the Rubric relating to baptism, before we admit the baptism to be invalid, which was held valid even when the Rubric of the Burial Service had not as yet taken away the rite from all who were unbaptised.

The Rubric of 1603, instead of directing “those present,” in the case of private baptism, as the former Rubrics had done, directs “the lawful minister” to say the prayer, if time permit, and to dip or sprinkle the child and repeat the words. The Rubric of 1661 explains what shall be intended by “lawful minister,” substituting for that expression the words “minister of the parish, or, in his absence, other lawful minister that can be procured.” It there prescribes a prayer to be used by the minister, which prayer is not to be found either in the Liturgies of Edward VI. and Elizabeth, or in that of 1603. We may pass over the Rubric of 1603, both because its substance is more completely

contained in that of 1661, and because, until 1662, there was no statutory authority for any \*change of the law which had been established at the date of 1603 (or 1604), when the canon in question was made, even if it had been quite clear that the Rubric of that date had changed the former Rubrics. But as, in 1662, the present Uniformity Act of 13 & 14 Car. II. cap. 4, was passed, and gave force and effect to the Rubric of that date, it becomes necessary to see whether or not that Rubric changed the former ones, those of Edward and Elizabeth.

ESCOTT  
r.  
MASTIN.  
[ \*130 ]

Now it does not appear that any such change was effected as the case of the present appellant must assume, in order to prevail. The words are plainly directory, and do not amount to an imperative alteration of the rule then subsisting. If lay baptism was valid before the new Rubric of 1661, there is nothing in that Rubric to invalidate it. Generally speaking, where anything is established by statutory provisions, the enactment of a new provision must clearly indicate an intention to abrogate the old; else both will be understood to stand together if they may. But, more especially, where the common law is to be changed, and, most especially, the common law which a statutory provision had recognised and enforced, the intention of any new enactment to abrogate it must be plain, to exclude a construction by which both may stand together. This principle, which is plainly founded in reason and common sense, has been largely sanctioned by authority. The distinction which Lord Coke takes in one place, between affirmative and negative words, giving more effect to the latter (Coke upon Littleton, 115 a), has sometimes been denied, at least doubted, (W. Jones, 270, *Lovelace's case*, before the Windsor Forest Court, in 1632, in which there is a *dictum* of Lord Chief Justice RICHARDSON,) Mr. Hargrave thinks upon \*a misapprehension. (Note 154.) But the rule which is laid down in 2nd Inst. 200, has been adopted by all the authorities, that "a statute made in the affirmative, without any negative expressed or implied, doth not take away the common law." So Comyns's Digest, Parliament R. 23; and he cites the case *De Jure Ecclesiastico*, in 5th Rep. 5 b, which lays down the rule in terms. That case decides that the penalty attached by the Uniformity Act of Elizabeth, for not reading the Common Prayer, on the second offence, does not take away the same common law penalty on the first offence. Now here, the former law being this—"Let lay baptism be valid, but let ministers only perform the rite, unless in case of great necessity"; and the new law

[ \*131 ]



ESCOTT  
MASTIN.

being—"Let lawful ministers baptise;"—it must be taken as an addition to, and not a substitution for, the former, unless the intention plainly appear to make it substitutionary, and not cumulative. The proof is on those who would make it substitutionary and abrogatory. But the circumstances and the context seem, on the contrary, to show that the intention was to make the new Rubric cumulative, and to leave the validity of lay baptism unaltered. The private baptism is expressly confined to cases of "great cause and necessity," and the want of time is expressly referred to, as being great enough possibly to prevent saying the Lord's Prayer. How then can it be expected that time should be given to send for the minister of the parish, and, if he be absent, to procure some other minister? Doubtless it is required that a minister shall perform the ceremony if he can be procured; but the possibility of there being none, must be understood to have been contemplated. Again, it is directed, that if any lawful minister, other than the \*minister of the parish, performed the ceremony, then the minister of the parish, when the child is brought to him, shall examine how the ceremony had been performed. The questions prescribed by the former Rubrics are materially changed. Two are left out; that respecting calling for grace, and that respecting their opinion of the ceremony having been completed. But an important preamble is inserted, before the question as to the matter and the words: "Because some things essential to this sacrament may happen to be omitted, through fear or haste, in such times of extremity, therefore, I demand further, 'With what matter and with what words was this child baptised?'" Now it is remarkable, that the essentials here spoken of are the water, and the reference to the Trinity; nothing whatever is said of the minister being essential. The questions as to who baptised and who were present, are given without any preamble at all, indicating that the water and the invocation of the Trinity are essentials, while the presence of a minister is only expedient; a matter to be inquired into for the purpose of correction or censure if it was omitted without necessity—but not essential, as those things wherein consisted the very rite itself, the water and the words. The water and the words are afterwards again stated to be "essential parts of baptism," in the Rubric which provides for the case of a doubtful baptism, sometimes called conditional. If it were assumed that in every case a lawful minister was necessary, and that there could be no baptism without his presence, the only

[\*132]

necessary question to be answered by those who brought the child, would be, whether such minister officiated or not, for it might be assumed that he used the matter and the words prescribed, inasmuch as he would be punishable if he did [not].

ESCOTT  
•  
MASTIN.

The whole direction as to conditional baptism is very material to be regarded, and no part more so than the last Rubric relating to it. If the answers are uncertain, the baptism is to be made, but provisionally or conditionally. What kind of uncertainty is contemplated? If a minister had been essential, surely any uncertainty as to who performed the ceremony would have been specified as a ground of conditional baptism. But nothing of the kind is to be found in the Rubrics of 1603 and 1661, any more than in those of Edward and Elizabeth. Nay, the uncertainty is more specifically confined to the water and the words in the latter than in the earlier Rubrics: "If it cannot appear that the child was baptised with water, in the name of the Father, and of the Son, and of the Holy Ghost," which (adds the Rubric) "are essential parts of baptism," then, and then only, is the child to be baptised, and conditionally.

[ 133 ]

The question directed to be put, as to who baptised the child, clearly proves nothing as to the necessity of a minister; for another question immediately follows, which relates to a matter that must on all hands be admitted to be anything rather than essential, namely, "Who were present at the ceremony?" And if it be said that this might be asked, not as a substantive question, the answer to which is essentially necessary, but as a question the answer to which may tend to facilitate other inquiries, and to explain other answers: in the same way it may be said, that the answer to the first question, "Who baptised the child?" may be used simply for the purpose of explanation as to the really essential matters—the water and the words.

The changes made in the Rubric, touching uncertain and conditional baptism, are mainly relied upon to show that the Rubrics of 1603 and 1661 invalidated \*lay baptism, and certainly those changes afford the only countenance lent to the negative argument. But they are wholly insufficient to work an abrogation of the former law. The omission of the question, "Whether they (the people) called for grace and succour in that necessity?" is said to show that the people were no longer to officiate, but only the minister, who had no occasion for that succour. Yet, beside that, this seems a very gratuitous position, the persons present were inquired of,

[ \*134 ]

ESCOTT  
v.  
MARTIN.

and they surely were not material. The question as to the opinion of the party bringing the child is also omitted. But it is not omitted in the Rubric of 1603, which, nevertheless, is supposed to negative the validity of lay baptism as much as the Rubric of 1661. Perhaps the most material change in this part of the service is in the certificate, which is no longer that "Ye have done well," but "that all is well done." But this, though in the direction of the appellant's argument, and lending colour to it, is manifestly too slender a foundation on which to ground any inference. We must always bear in mind, that it was the intention of those who framed the new Rubric to discountenance all baptism, except by a minister, and to assume, as far as possible, that it should by a minister be performed ; and the omission of whatever was not quite necessary, and what needlessly contemplated a lay administration of the rite, was a natural consequence of this design. But if it had been the intention of those who framed the Rubric to declare lay baptism ineffectual, some express declaration to that effect would have been introduced.

[ '135 ]

It is unnecessary to give instances of the difference between positive directions, nay, express prohibitions, and such prohibitions as make the thing forbidden to \*all intents and purposes void. If it were necessary to point out instances of such distinctions, the kindred subject of the marriage rite affords one too remarkable to be passed over. There is hardly any country where some solemnity is not required by the directions of the law ; there are many in which a departure from the order prescribed by the law is strictly forbidden, and under penalties ; but in most Protestant countries the irregular marriage is valid ; and in Catholic countries also, up to a comparatively recent date—that of the Council of Trent—though it might be censurable, was valid, without the interposition of a priest, and without any ecclesiastical solemnity whatever. England, before the Marriage Act, (the 26th of Geo. III. cap. 33,) commonly called Lord Hardwicke's Act, affords one instance of this ; Scotland to this day affords another ; nay, the existing Marriage Act of 4 Geo. IV. cap. 76, presents us with an instance still more remarkable, and bearing more closely upon our present argument ; for some of the marriages, to prevent which was the main object of this as of the former Act, are allowed by this latter Act to be valid, and are only valid because they fall not by express declaration within the 22nd section, which certainly confines the invalidity to the cases specified in that section. But if it be said

ESCOTT  
r.  
MASTIN.

that baptism is a sacrament, which marriage is not, let it be remembered that in the Romish Church marriage too was a sacrament, and retained its character as such though performed without the intervention of a priest or any solemnity of the Church: *Dalrymple v. Dalrymple* (1), and the authorities were cited.

The opinions and practice of the Church, from the date of the canon, 1603, down to that of the Uniformity Act of Charles II., and afterwards till near the end \*of Queen Anne's reign, appear to have been clear upon this head. The validity of lay baptism, notwithstanding the change in the Rubric, was not questioned until about 1712, when the controversy arose, and some eminent divines took part against its validity. It is unnecessary to examine the authorities in detail. We may observe, that there seems no comparison between the number and the weight of those who espoused the opposite sides of the question. There are very few indeed who can be said to give a clear and explicit opinion against the validity, while those who maintain it lay down the doctrine with the most perfect distinctness. The substance of the conclusions to which they come, and the testimony which they bear to the practice, may be well given in the words of a writer no less renowned for his learning and judgment than his eloquence. "Sith the Church of God," says Hooker (Ecclesiastical Polity, book v., sec. 62), "hath hitherto always constantly maintained that to re-baptise them which are known to have received true baptism, is unlawful; that if baptism seriously be administered in the same element and with the same form of words which Christ's institution teacheth, there is no other defect in the world that can make it frustrate, or deprive it of the nature of a true sacrament; and lastly, that baptism is only then to be re-administered when the first delivery thereof is void in regard of the forealleged imperfections, and no other (that is, the words and the matter)—shall we now, in the case of baptism, which, having both for matter and form, the substance of Christ's institution, is by a fourth set of men (he had mentioned with more or less censure, the errors of some in the primitive Church, of the Donatists, and of the Anabaptists), voided for the only defect of ecclesiastical \*authority in the minister, think it enough that they blow away the force thereof with the bare strength of their very breath, by saying, 'We take such baptism to be no more the sacrament of baptism than any other ordinary bathing, to be a sacrament?'" And he then goes on to show how "many things

[ \*136 ]

[ \*137 ]

ESCOTT  
C.  
MASTIN.

may be upheld being done, although in part done, otherwise than positive rigour and strictness did require."

The clear and unqualified opinion upon the point, and *post litem motum* of the two Metropolitans and fourteen other prelates, has also been properly referred to; and is no doubt of great weight. But the question is not to be decided by a reference to the opinions, however respectable, of individuals, eminent for their learning, or distinguished by their station in the Church; and these authorities are chiefly valuable as bearing testimony to the fact, that the construction of the Rubrics of 1603 and 1661 was acted upon, which construction assumed no change to have taken place in the former law, the common law of all Christendom before the Reformation of the Anglican Church, and both before and after that happy event, the law of the same Church up to the date of the canons of 1603—a law which was recognised by the statutes of Edward and Elizabeth, and which, as nothing but express enactment could abrogate, so we might the rather expect to find contemporaneous usage confirm, when no abrogation had been effected.

[ \*138 ]

Nor is it necessary that we should strengthen the conclusions to which a strict construction of the law has led, by pointing out the inconsistent or even absurd consequences which would follow from an opposite doctrine. If only a lawful minister can baptise, then, as it is also contended that this description only \*applies to those who are regularly and episcopally ordained, it will follow, that none can be capable of clerical functions who have not themselves been baptised by ministers so ordained; and hence some of the greatest lights of the Church have held her highest offices unbaptised, have administered that sacrament invalidly, and have had no right to the offices of the Church at their interment. A doctrine which would lead, and inevitably lead, to the inference that Bishop Butler and Archbishop Secker were never baptised—that the latter in baptising George III. acted without authority, and that both were disentitled to the Burial Service, as unbaptised persons, is at least well calculated to make us pause before we admit it to be the law of the land, and of the Church.

But it is not less fitted to excite doubts of its soundness before examination, when we reflect that another inevitable consequence would also flow from its admission,—the exclusion from the Church's pale, of all Dissenters, and of all foreigners who have been baptised otherwise than by ministers of episcopal ordination.

No *lex loci* is set up, or can be pretended, to work any exception in their favour. The Rubric, if it applies to any, applies to them; and unless they shall have been re-baptised, they can neither be ordained, should they embrace our tenets, nor buried with the rites of our Church, should they depart this life within our territory. All these topics are, however, superfluous, when the question has been sifted upon its true merits, and brought to the test of a more rigorous examination, as was done both in the present case by the Court below, and in the former instance before the late learned and able Judge of the Arches Court, Sir JOHN NICHOLL.

ESCOTT  
v.  
MASTIN.

The case of *Kemp v. Wickes* in 1809 (1), was in every respect, as regards the facts, similar to the present. It underwent a full discussion; the only difference was in the course pursued by the defendant in his pleading, which was more commendable than that adopted in this case; and the learned Judge pronounced an elaborate judgment upon the point now before the Court, as to the merits, neither of the preliminary objections having been taken. That judgment does not appear to have given any dissatisfaction in the profession; on the contrary, it is believed to have carried along with it the opinion of lawyers in both the Courts Christian, and the Courts of Common Law. We can hardly avoid attaching great weight to a decision pronounced by such an authority, so long acquiesced in, so little objected to, and, generally speaking, so much respected, although no decision has hitherto been given on the same question in any Court of the last resort.

[ 139 ]

The Court below justly held, that if the penalty of the canon has been incurred, no discretion is left in awarding its infliction. It appears to us, also, that the costs were properly directed to be paid. \* \* \*

The sentence appealed from must, therefore, be affirmed, in all its parts, and the appellant must further pay the costs of this appeal.

[ 140 ]

(1) 3 Phill. 264.

1848.  
June 24.  
1844.  
Feb. 21.

Lord  
LYNDHURST,  
L.C.  
[ 265 ]

ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY (1).

JAMES ILOTT v. MARY GENGE (2).

(4 Moore, P. C. 265—271.)

The mere circumstance of the deceased having called in two witnesses "to sign a paper for him," (which they did in his presence), but without any explanation of the nature of the instrument being made to them, or the witnesses being able to see if any signature or writing was upon it when they attested it: Held by the Judicial Committee of the Privy Council, affirming the judgment of the Prerogative Court, not to amount to an acknowledgment of the signature by the deceased, so as to satisfy the provisions of 1 Vict. c. 26, s. 9, and probate refused to such paper.

This was originally a cause of proving, in solemn form, a holograph instrument made by the Rev. Henry Masterman, deceased, purporting and intended to be his last will and testament. The paper was signed by him, and attested by three witnesses; the attestation clause being in these words, "Signed, sealed and delivered in the presence of us, Samuel Hopkins, Henry Eaton, and John Chaffy, the 8th of September, 1841." It contained various bequests, and appointed the appellant, James Ilott, and Thomas Balston, executors.

[ \*266 ] Upon inspection of the paper, it presented the appearance of the signature of the deceased, and the date on which the execution took place having been written with different ink from the body of the will, and inserted \*after the will was written: and as the attestation clause did not show upon the face of it that the provisions of 1 Vict. c. 26, s. 9, had been sufficiently complied with, the subscribing witnesses were applied to, to make an affidavit in the form required by the practice of the Prerogative Court, to supply this defect; they declined, however, to make such affidavit, whereupon a *caveat* having been entered, the paper was propounded in solemn form by the appellant, as an executor named therein, and opposed by the respondent, Mrs. Genge, whose interest, as the lawful second cousin, and next of kin of the deceased, in case he had died intestate, was admitted.

The first article of the allegation pleaded that on the 8th day of September the deceased, at about four o'clock in the afternoon,

(1) Present: The Lord Chancellor (Lord Lyndhurst), Lord Brougham, the Lord Chief Justice of the Queen's Bench (Lord Denman), the Lord Chief Baron of the Exchequer (Lord Abinger), Lord Campbell, Mr. Baron Parke, the Vice-Chancellor Knight

Bruce, and the Right Hon. Dr. Lushington.

(2) *Fischer v. Popham* (1875) L. R. 3 P. & D. 246, 249; *Daintree and Butcher v. Fasulo* (1888) 13 P. Div. 67, 70, 102, 103.

LOTT  
r.  
GENGK.

called on Samuel Hopkins, the parish clerk of Milton Abbas, who was at work in his shop, with Henry Eaton, his son-in-law, and said, "I want to hinder you two for a short time, to come to my house to sign a paper for me," or to that very effect; upon which the said Samuel Hopkins said, "We will come immediately." That the deceased then left, and went to his own house. That Hopkins and Eaton shortly afterwards went to the deceased's house, and found him standing at his writing desk, which was so placed on a small table near the wall that his back was turned towards them as they entered the room. That on their entering the room, the deceased turned round and said, "Well, Mr. Hopkins, you are come: I want you to sign this paper for me." The deceased then turned round again to his writing desk, and still standing up, did something with the paper, and it appeared to them, from his attitude and manner, that he was writing upon it. That after \*a short interval, during which the deceased was so employed, he moved the paper from the desk, and put it on the table on which the desk was standing, and said, pointing with his finger to the bottom thereof, "Sign your names here." That Hopkins then took the pen, which was in the ink bottle, and which apparently the deceased had been just using, and signed his name in the deceased's presence, and in the presence of the said Eaton, and Eaton also signed his name in the presence of Hopkins and of the deceased; but that the upper part of the said paper was so folded or turned down as to conceal the writing on the concluding part thereof, so that Hopkins and Eaton could not see whether or no there was any signature or seal to it. That the deceased, on the same afternoon, called on John Chaffey at the School House, and requested him to put his name to the paper, under those of Hopkins and Eaton, which he accordingly did; that the said paper was again so folded or turned down, as to conceal the writing on the concluding part thereof, but neither Hopkins nor Eaton were present when this third person signed.

[ \*267 ]

The second article pleaded the handwriting.

The depositions of the subscribing witnesses were taken, and they were also examined upon interrogatories. Hopkins, in his deposition respecting the signing of the paper by the deceased, stated that when he and the other witness, Eaton, went into the room, "The deceased was standing at a table on which was a little desk, his back to us, directly opposite the door at which we entered. He was doing something to a paper which was before



ILOTT  
v.  
GENGE.  
[ \*268 ]

him, for I could see a portion of it. I think he was folding it. It was at that table and desk that he did all his writings, as far as I \*knew; there he used to be sitting, for it was high enough for that, and no more. But at the time of which I am speaking, he stood leaning forward. I am sure he was doing something to the paper before him; folding it I think. I could not swear that he was not writing; but I think if he was writing (when we went in) I should have seen and remembered his putting the pen into the little glass inkstand, in which it was when I saw it." He then deposed to the circumstances attending the signing of the paper by himself and Eaton, as pleaded in the allegation. To the interrogatory put to him, whether the deceased made use of a pen between the time he (the witness) went to him in his study, and that of his subscribing his name, he said, "I cannot swear that the deceased did write anything at all in my presence on the occasion deposed of, between the time when I so went to him in his study and of my subscribing my name as I have deposed. If he did write anything, I do not know why it might not have been as well filling up the date as signing his name."

[ \*269 ]

The witness Eaton in his deposition stated, "We went into Mr. Masterman's house the back way, put down our hats on the kitchen table, and went on to his study door at once, because he had wished us to come as soon as possible. The door of that room was open: Mr. Masterman was standing at his writing-desk right facing the doorway, so he had his back to us as we entered. The writing-desk itself was, I should say, a foot and a half long, and about fourteen inches wide, the length being from right to left or left to right, and the desk itself stood on a table up against the wall: I had often seen him writing at that desk in that place. He commonly sat to write; he kept \*but one chair in the room, and in it he used to sit at his desk when I have seen him writing. He was a tall man, and had to stoop if he stood to do anything at that desk. When I went into the room I saw nothing but his back; I could not tell what was before him on the desk, if anything. Apparently to me, he was leaning over the desk doing something to, or else looking at, what was on it; and that it was a paper that was on it was shown immediately from what followed. We had but just entered the room, when Mr. Masterman, turning half-round, said, 'Well, Mr. Hopkins, you are come.' My father-in-law said, 'Yes.' 'Well,' he said, 'I want you and Henry to sign this paper for me.' 'Certainly, sir,' we said. Mr. Masterman then stood a little aside to allow us one

at a time to come to the table, and holding a folded paper so covered that there was no telling whether there was anything on it or not; or what was on it, I should say, for doubtless there was something on it, or he would not be hiding it as he did. He pointed to my father-in-law, where he should write his name, which he did; and then the same with me. It was close under where the upper part of the paper folded down upon it that we had to sign our names as we did. Mr. Masterman never said what it was we were signing."

ILOTT  
v.  
GENGE.

To the interrogatory respecting the execution of the paper by the deceased, the witness said, "I could not say whether he (the deceased) was writing or not, from his manner. The time was very short, and I do not know how I can give a truer account of what was done than as I have deposed. The paper in question was not sealed in my presence or delivered, unless what I have deposed to was delivery. It does seem \*to me as likely that the paper in question should not be signed, as that it was not sealed in my presence."

[ \*270 ]

The learned Judge of the Prerogative Court (Sir HERBERT JENNER FUST (1)), by his decree, pronounced against the validity of the testamentary paper, being of opinion, under the circumstances of the case, that the signature was not acknowledged, either expressly or virtually, within the meaning of the Act of Parliament, in the presence of two witnesses present at the same time.

Against this decision the present appeal was brought: the appellant relying upon the following reasons as the grounds of appeal:—

First. That, under all the circumstances of the case, it was to be presumed that the will was signed by the testator in the presence of two witnesses. And,

Secondly. That the testator virtually acknowledged his signature in the presence of two witnesses.

For the respondent it was contended that the paper was not executed pursuant to the requirements of the 1st Vict., chap. 26, sec. 9, and was therefore invalid.

The appeal was argued in the first instance by

*Mr. Wigram, Q.C., and Dr. R. Phillimore, for the appellant, and*

*Dr. Addams and Mr. Cleasby for the respondent.*

1843.  
June 24 (2).  
—

(1) Reported 3 Curteis, 160.

Lord Campbell, and the Right Hon.

(2) Present: The Lord President  
(Lord Wharnccliffe), Lord Brougham,

Dr. Lushington.

LOTT  
v.  
GENGE.

Their Lordships afterwards directed the case to be re-argued by one counsel on each side. Accordingly,

[ 271 ]

*Mr. Wigram*, Q.C., argued the case on the part of the appellant, and

*Dr. Addams* was heard for the respondent.

The following authorities were referred to in the course of the argument: upon the question of acknowledgment under the Statute of Frauds: *White v. The British Museum* (1), *Peate v. Ogily* (2); and upon the question raised, namely, the presumption that the will was signed by the deceased in the presence of witnesses, *McQueen v. Farquhar* (3), *Wright v. Wakeford* (4), *Talbot v. Hodson* (5), *Bond v. Seawell* (6), *Hands v. James* (7), *Croft v. Pawlet* (8), *Shires v. Glascock* (9), *Newton v. Clarke* (10), *Blake v. Knight* (11).

#### THE LORD CHANCELLOR :

In this case we do not think it necessary to decide the question as to whether or not the instrument was signed before the witnesses were called in; but, assuming that it was signed by deceased before the witnesses were called in, we are of opinion that the mere circumstance of calling in witnesses to sign, without giving them any explanation of the instrument they are signing, does not amount to an acknowledgment of the signature by a testator. We are all of opinion that the instrument was not signed in the presence of the witnesses. The cases which have been referred to under the old law, we think do not apply. We affirm the sentence of the Court below, and give costs, both here and below, out of the estate.

(1) 6 Bing. 310.

(2) Comyns, Rep. 196.

(3) 8 R. R. 212 (11 Ves. 467).

(4) 17 Ves. 454; see 15 R. R. 363, n.

(5) 7 Taunt. 251.

(6) Burr. 1773.

(7) Comyns, 531.

(8) 2 Stra. 1109.

(9) Salk. 688.

(10) 2 Curt. 320.

(11) 3 Curt. 547.

## ON APPEAL FROM THE PREROGATIVE COURT OF CANTERBURY.

HENRY SPENCER COOPER *v.* DANIEL SMITH  
BOCKETT, THOMAS COOPER, AND THE REV.  
JERMYN PRATT (3).

(4 Moore, P. C. 419—453.)

The *factum* of a will, held under the circumstances of the case, to be sufficiently proved, though one of the subscribing witnesses deposed that he did not see all that the testator wrote, only the large initial of his christian name; and the other witness stated that she did not see what he wrote, but that he acknowledged the paper to be his will, in their joint presence.

Evidence of illiterate witnesses as to acts not affecting their interests, when opposed to the probable acts of an educated man, no fraud being in question, is to be received with great caution.

The will contained alterations and erasures, affecting the amount and objects of the testator's bounty, the existence of which, at the time of the execution, the attesting witnesses could not depose to:

Held by the Judicial Committee, in the absence of all direct evidence as to the alterations and erasures, that the presumption of law was, that the alterations and erasures were made after the execution of the will, and probate of the will granted in its original form.

THIS was an appeal from the Prerogative Court of Canterbury, in a cause of granting letters of administration of the goods, &c., of Robert Henry Spencer Cooper, a retired Captain of the Royal Engineers, who died on the 17th of April, 1843. After his death, a will was found in his writing-desk, enclosed in a sealed envelope, endorsed, or superscribed, "The Will of Robert Henry Spencer Cooper, 9, Pall Mall East, 7th January, 1843." It occupied one page of a sheet of letter paper, and was wholly in the handwriting of the deceased, was subscribed by him, and bore date \*the 7th January, 1843, and purported to have been executed in the presence of two subscribing witnesses: it had several obliterations and alterations, and was as follows:

"This is the last Will and Testament of me, Robert Henry Spencer Cooper, a retired Captain of Royal Engineers. I will all my property, after my decease, and funeral expenses paid, to be converted into those funds of the Bank of England yielding now 3l. per cent. per annum; and the annual proceeds, after deducting

(1) Present: Lord Langdale, Mr. Baron Parke, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

(2) The Lord President (Lord Wharnccliffe), Lord Brougham, the

Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

(3) *In the Goods of Sykes* (1873) L. R. 3 P. & D. 26, 27; *Wright v. Sanderson* (1884) 9 P. Div. 149, 153, 154.

1844 (1).  
June 17.  
Dec. 17, 18.  
1845.  
Jan. 17.  
Feb. 3.  
1846 (2).  
Feb. 7.  
—  
Lord  
BROUGHAM.  
[ 419 ]

[ \*420 ]

COOPER  
P.  
BOCKETT.

the following life annuities, to go to my brother, Henry Spencer Cooper, barrister-at-law, and at his death, to the lawful issue he

(1) *die without issue*

*family*

may leave. If he leave none, I will such to go to the persons

*Captain Symonds, of Lymington, Hampshire,*

of the Pratt family, of Norfolk, not to that one married to Lord

Rendlesham, nearest related to my mother's family, whose father

resided formerly at Bury St. Edmund's, Suffolk. Out of the said

annual proceeds, I will an annuity of one hundred pounds sterling,

clear of duty, to my aunt, Mrs. Charlotte Moyle, of Croomshill.

Greenwich, during the term of her natural life. Also, I will an

annuity of one hundred pounds sterling yearly to the sister of my

late father, Mrs. Caroline Randall, duty free, during the term of

her natural life. Also, I will an annuity of seventy pounds

sterling, duty free, to Mary Jenkins, niece to the above Mrs. Moyle,

during the term of her natural life, duty free. *Also, I will twenty*

[ \*421 ]

*pounds sterling, duty free, yearly, to \*Thomas Cooper, son of ———,*

*uncle Thomas Cooper, during the term of his natural life, and while*

*he is in distress and unemployed* (2). And, in the event of Mrs. S.

Skyring, of Somerset House, dying, and leaving her father and

mother in distress, I will yearly to the said parents of Skyring,

J. and S. Stonoham, thirty pounds yearly for their natural life, and

to the survivor, free of duty. I name executors to this my will,

Daniel Smith Bockett, of the Law Life Assurance Society, 60,

*whom I*

*to*

Lincoln's Inn, and to I will one hundred pounds sterling, and my

brother, Henry Spencer Cooper above named.

(L.S.)ade at 9, Pall Mall East, this seventh Jan. 1843."

"Codicil: To my man, Wm. Cobbett, I will fifty pounds, clear of tax.

Witnesses to } GEORGE CRITTENDEN.  
the said will. } MARY CRITTENDEN (3).  
Signature. }

R. H. S. COOPER,  
9, Pall Mall East.  
Servants at house."

A caveat having been entered by the appellant, the natural and lawful brother and only next of kin of the deceased, the will was

(1) The words in italics were written upon those underneath, but not so as to render the latter illegible.

(2) The sentence printed in italics was erased by zig-zag scratches of the pen, but was not illegible.

(3) On the left of the witnesses'

names was a bracket, from which a circumflex line was drawn, intended, apparently, to enclose a space for their signatures, but the space not being sufficient, the line was passed by the last letter of the first witness's name.

propounded in solemn form of law. The ground on which the appellant opposed probate, was, that the testator had not signed the will until after the witnesses, and, consequently, had not complied with the requirements of the statute 1 Vict. c. 26, s. 9. An allegation having been asserted and \*brought in on behalf of the respondents, the two subscribing witnesses, George Crittenden and Mary Crittenden, his wife, were examined in chief; and on interrogatories. To the first article of the allegation, George Crittenden deposed: "I am porter at the house, No. 9, Pall Mall East. I have been there about ten or eleven months. It is a house let out in private chambers; my wife is portress there. Captain Robert Spencer Cooper was living in the house when I went there, and he continued there until his death. I and my wife attended him, but he had a servant of his own. At first, a female servant, but latterly, and at the time of his death, a man servant. I recollect witnessing his will perfectly, but the day or the month I could not say; as near as I can tell, it was about three months before he died. I had been out for him with a letter to Mr. Cooper, his brother, in the Temple, and on my return, about one o'clock, I went to his room to tell him that I had not found Mr. Cooper at home, and that I had put the letter into the letter-box. I found him writing at a table, and when I had delivered my message, he desired me to sit down, and when I had been sitting so about five or ten minutes (and he was writing during that time), he said to me, that he wished me to put my name to something; his words were, 'I want you to sign your name to this paper' (that was the paper before him); 'will you?' I said, 'I don't know what I am going to sign, Sir.' He said, 'Oh, you need not be afraid, for this is my will.' I then rose up for to sign, and he then said, 'You had better fetch your wife up stairs first,' and I said, 'Shall I do so, Sir?' and he said, 'Yes.' From that I went, and fetched her up, and when we went into his room, we found him standing at the table which he had been writing at, with a pencil in \*his hand, and as he was standing he wrote my name and my wife's name in pencil. My wife asked him if he knew how to spell our name, and he said 'Yes,' and repeated it, 'Crittenden,' and my wife said, that was right. Then he sat himself down, and called us to the table, and he put the will towards me, and said, 'You sign your name there,' pointing to my name, which he had written in pencil, and I took the pen, and wrote my name over the pencil-mark. Then he said to my wife, 'Now, you sign your name on this pencil-mark,' pointing

COOPER  
v.  
BOCKETT.

[ \*422 ]

[ \*423 ]

COOPER  
 T.  
 BOCKETT.

to the one under mine; 'you'll write your name better than he has done his;' then my wife signed her name. Then Captain Cooper took the pen from my wife, and wrote, and when he had done so, he said, looking up at me, 'This is my name, in your presence,' and I understood then that he was writing his own name. I did not see all he wrote, but I saw him make the large 'R' of his name, and there was a black seal at the left-hand corner quite, but there was nothing said about that, and after he had wrote his name, he said, 'Now you have done some good for yourselves,' and nothing more passed. He said, 'Mrs. Crittenden, I don't want you any more; you can go;' and my wife went down stairs. I stopped a few minutes afterwards, when he told me that he did not want any thing more with me, and I went away, and when I left the room the paper was still lying before Captain Cooper, and what became of it I cannot say, for I never saw it afterwards. Captain Cooper was in his perfect senses at the time, and fully capable of giving instructions for, and of making and executing his will, and of doing any act requiring thought, judgment, and reflection. He was only about forty-nine years old, and he was perfectly sensible to the last almost. He \*wrote nothing but his name, at least I believe it was his name, in our presence. As soon as he had done, he put down the pen, and wrote no more. Before he signed his name he made a mark round ours. The will which was produced to me by the examiner, is the will which I and my wife signed our names to, as I have deposed, and the large 'R' in Captain Cooper's signature is what I saw him write after I had signed my name, and my wife had signed hers. The words, '9, Pall Mall East, servants at house,' were not written in my presence, to the best of my belief. Captain Cooper wrote nothing in my presence but his name. I have no doubt, that as the will is dated the 7th of January, 1843, it was executed on that day; it was a Saturday, I remember."

[ \*424 ]

To the second article he deposed: "I do not recollect the day on which William Cobbett came into Captain Cooper's service; but if Captain Cooper had lived to another Wednesday, Cobbett would have been in his service a month, I think. Captain Cooper never took the least notice of his will, or of the execution of it after it had taken place, at least in my presence. As to the alterations which I now see on the will, I cannot say whether they were or were not on the will when I signed it. I have something on my mind, that there was something of the kind too, but I was confused

COOPER  
v.  
BOOKETT.

and flurried at the time; for though I was but signing my name to a will, yet I had never done so before, and I did not know but that trouble might come of it, and the Captain was a very sharp and severe man, and I was not so much at my ease as to observe exactly what occurred, or what appearance the will had. I do firmly believe, however, that there was some black scratching on the will when I signed it."

To his examination on interrogatories, the same witness stated :  
"I have not been given to understand in any way that it was wished to be made out by my evidence that Captain Cooper signed or acknowledged his signature to his will in my presence, my fellow-witness being also present; I will swear that no such directions or instructions have been given to me, and that I have not received any hints to that effect. Captain Cooper did sign his will in my presence; I believe that he did: and he certainly acknowledged it in my presence, for he said, 'That is my name.' He signed it, as I have stated, after I and my wife had signed our names to it. The very words he used were, 'This is my name in your presence;' and he looked up to me as I was standing on his right-hand side at the time; my wife was present at the time, standing behind me; it was after we had signed our names. I do not believe that Captain Cooper's signature was to the will when I and my wife signed it. There was a blank space where his signature now is when I signed my name. I have never admitted or declared that such was the case until now, nor has my wife, that I am aware of. When I have been questioned about the matter, I have stated, and it is the fact, that Captain Cooper had a pencil in his hand, and wrote my name and my wife's on the place where we afterwards signed our names. I have said that he was writing with a pencil when we went into the room. I have never said, and it is not the fact, that I first signed my name to the will in question at the request of Captain Cooper, and then called up my wife, who also signed. I have never said, and it is not the fact, that Captain Cooper signed his name to the will in question after my wife had signed her name to it, and left the room; I have never told my \*wife so: I will swear that I never have. We were all three in the room together when we signed our names. I cannot say for a certainty whether there were or were not any alterations in the will in question when I signed it. I have a notion of some black scratching upon it, and that is all I can say about it."

[ 425 ]

[ \*426 ]

Mary Crittenden deposed: "I am porteress to the house No. 9,



COOPER  
ROCKETT.

Pall Mall East, and my husband is porter. It is a house let out in chambers to single gentlemen. I have been there nearly a twelve-month. Captain Cooper, the deceased, was living in chambers there when I went to the house, and he remained there until his death. He had a female servant of his own, and latterly a man servant, too; but I cooked for him during his illness, and helped in his rooms; and my husband went errands for him. I recollect witnessing his will perfectly well; it was on a Saturday, early in January last, soon after he was taken ill, and it was about one o'clock in the day; he dined at two regularly, and I know that it was before his dinner. The way I came to be a witness to Captain Cooper's will was this: my husband had been out on an errand for him, and soon after he returned he came to me and said, 'The Captain wants you to sign a paper with me;' and so I went with my husband to the Captain's room, and there the Captain was standing at his table, with a piece of paper before him, and he took a pencil, and said that he wanted us to sign our names, and that he would pencil them first where we were to sign; and so I said I would take the liberty of asking him if he knew how to spell our name, and he spelt it, and spelt it right; and when he had written the names, he gave my husband the pen, and told him to write his name over the pencil-mark, and my husband wrote his name \*as he was told; and when he had written it, the Captain gave me the pen, and told me to write mine, and said, 'I dare say you will write it better than he has,' but I don't think I did write it better: however, I wrote my name as the Captain told me, over where he had pencilled it, and then the Captain took the pen and made a kind of circle round our names, and then he wrote something, but what it was I cannot say, for my husband was standing near him, and in the way; but the Captain said, 'This is my will, and my name in your presence, and you have done some good for yourselves;' those were the words he used, as well as I recollect, and he said nothing more, except to tell me to go down stairs, as he did not want any more with me; and so I went, leaving my husband with him: and that is all I know or recollect about it. I have no doubt that Captain Cooper was, at the time this took place, of perfect sound mind, memory, and understanding, and fully capable of making and executing his will, and of doing any act requiring thought, judgment, and reflection. The will now produced to me by the examiner is the will which I and my husband signed as requested by Captain Cooper, as I have deposed; but whether he

[ \*427 ]

wrote the words '9, Pall Mall East, servants at house,' after we had signed our names, or what he wrote, I cannot say, for I did not see; it was a blank space all to the right, as well as I recollect now, when I signed my name, and I so well recollect the black seal at the left corner, and I should have known it was a will even if the Captain had not said so, though I had never seen one before, by that seal; I remarked it so at the time."

COOPER  
 v.  
 BOCKETT.

To the second article she deposed: "William Cobbett came into Captain Cooper's service on the twenty-third \*of March last, I believe; I never saw Captain Cooper's will after the time I signed it, and I did not notice whether there were or were not any of the alterations which I now see in it."

[ \*428 ]

The same witness on her examination upon interrogatories stated: "I cannot say whether Captain Cooper signed his will in my presence, or not; I did not see what he wrote, but he said, 'This is my name in your presence,' and so I suppose he had written his name when he said so. I do not recollect the words he used better than I have told them; my husband and I were both present at the time Captain Cooper used those words, and it was after we had signed our names to the will. I cannot say that Captain Cooper's name was signed to the will when I signed it; as well as I can now remember, it was all blank where I now see Captain Cooper's signature. I have admitted such to be the fact, and so has my husband, I believe, when asked about it. My husband had not signed Captain Cooper's will before I was called into the room to sign it; I will swear that my husband signed it afterwards in my presence. My husband has never told me that Captain Cooper signed the will after I had left the room; it was after I had signed my name, and not before, that Captain Cooper made the mark round about our names."

The respondent also brought in the affidavit of Joseph Netherclift, a fac-similist and lithographer, who deposed as to the erasures and the words previously written, as printed in italics in the copy of will above given.

The learned Judge of the Prerogative Court, by his sentence, on the 8th of August, 1843 (1), pronounced \*for the force and validity of the will, and decreed probate thereof, with the several alterations now appearing therein, to Daniel Smith Bockett and Henry Spencer Cooper, the executors thereof appointed, or either of them.

[ \*429 ]

From this sentence, the present appeal was brought by Henry

COOPER  
r.  
BOCKETT.

Spencer Cooper, who prayed that it might be reversed, and the cause retained; and that the Court would pronounce against the validity of the will, that the deceased was dead intestate; and decree letters of administration of the goods and chattels of the deceased to be granted to him.

1844.  
June 17 (1).

The appeal was argued in the first instance, by

*Mr. Erle, Q.C., and Dr. Addams, for the appellant; and*

*Mr. Turner, Q.C., and Dr. Jenner, for the respondent, Bockett.*

It was argued on both sides as a question of fact, upon the evidence of the witnesses, whether, having reference to the probable circumstances under which the will was produced and witnessed, the deceased had signed the will before their subscription. *Blake v. Knight* (2), *Moore v. King* (3), *Gove v. Gawen* (4), *Chambers v. The Queen's Proctor* (5), were referred to.

[ \*430 ] At the conclusion of the argument, their Lordships said, that the question raised, involved not only one of fact, but also one of law, and directed the appeal \*to be re-argued with reference to that opinion. The appeal was accordingly again argued.

Dec. 14 (6).

*Mr. Wigram, Q.C., and Dr. Addams, for the appellant:*

From the testimony of the witnesses to the *factum*, it is clear that this will was not executed pursuant to the requirements of the statute 1 Vict. c. 26, s. 9. The witnesses must have subscribed before the testator. This is not a good execution; the signing and witnessing being simultaneous acts, nothing can satisfy the terms of the 9th section, but the testator signing first. \* \* \*

[ 431 ]

*Sir Thomas Wilde, Mr. Turner, Q.C., and Dr. Jenner, for the respondent:*

It is not necessary to give affirmative evidence by the subscribing witnesses of the fact of signing. The Court will judge from the whole of the case, and presume the execution by a testator upon the circumstances: *Blake v. Knight* (7). \* \* \*

(1) Present: Lord Brougham, the Vice-Chancellor Knight Bruce, the Right Hon Dr. Lushington, and the Right Hon. T. Pemberton Leigh.

(2) 3 Curt. 547.

(3) 3 Curt. 243.

(4) 3 Curt. 151.

(5) 2 Curt. 415.

(6) Present: Lord Langdale, Lord Campbell, the Vice-Chancellor Knight Bruce, and the Right Hon. Dr. Lushington.

(7) 3 Curt. 547.

*Dr. Addams*, in reply.

Previous to giving judgment, their Lordships called before them a witness of the name of Donough, who deposed to having been in the habit of examining and comparing writings, and so employed by the Bank of England for eleven years and upwards ; and being shown the original will, and required to state whether in his opinion the circumflex line surrounding the witnesses' names was made previous to or after their signature, replied that in his opinion the circumflex was made previous, and the name signed over it.

COOPER  
v.  
BOCKETT.  
1845.  
*Jan.* 17 (1).  
[ 433 ]

THE VICE-CHANCELLOR KNIGHT BRUCE :

The question in this case is, as to the testamentary validity of an instrument which was propounded and, after opposition, admitted to probate in the Prerogative Court of Canterbury, as the will of Robert Henry Spencer Cooper, who was, or had been, a Captain in the Royal Engineers. He died on the 17th of April, 1843, and is admitted to have been a bachelor, or, at least, not to have had a wife living at the time of his death, and to have left his brother, the appellant, his only next of kin.

*Feb.* 3.  
[ 434 ]

Captain Cooper's testamentary capacity is undisputed, and it is clearly proved, or admitted, that the instrument propounded was signed at the foot, or end of it, by himself ; that he so signed it *animo testandi* ; that this signature was made by him on or before the 7th of January, 1843 ; on which day, in the presence of two witnesses, present at the same time, he acknowledged that signature as his, and the instrument as testamentary ; and that, on the same day, the same two witnesses, at his request, in his presence, and in the presence of each other, subscribed the instrument as witnesses.

The appellant, however, not disputing these facts, contends that they do not satisfy the requisites of the 9th section of the Act of 1837, " for the amendment of the law with respect to wills," inasmuch as the signature by the witnesses, as he contends, preceded in time the signature of the alleged testator. The respondent denies this, but contends, further, that if the facts were so, it is immaterial. These two points, one of fact and the other of law, form the whole matter of the contest between the parties. The appellant has \*to maintain both points, it being sufficient for the purpose of the respondent if he is right upon either.

[ \*435 ]

(1) Present: Lord Langdale, Mr. Knight Bruce, and the Right Hon. Baron Parke, the Vice-Chancellor Dr. Lushington.

COOPER  
F.  
BOCKETT.

Their Lordships think it convenient first to consider the question of fact, and, in doing so, to assume the point of law to be in the appellant's favour.

There is not any evidence applicable to the matter of fact in dispute, except the document itself and the testimony of the two subscribing witnesses, the only persons who, besides Captain Cooper himself, were present when they subscribed it. The document, with the exception of the witnesses' signatures, is admitted to be wholly in Captain Cooper's handwriting. It is admitted, on the face of it, to be such, that had the two subscribing witnesses, by the accident of their death in Captain Cooper's lifetime, been rendered incapable of being examined, the other evidence in the case, with proof of the handwriting of the three signatures, would have been sufficient to establish it as a valid will ; a circumstance, however, which amounts to no more, and is of no more weight, than that there is on the face of the instrument, nothing to create or lead to an opinion that the testator's signature was preceded in time, by the signatures of the witnesses. The agreed facts then standing, as I have said, and the law being assumed to stand as the appellant contends that it does, is the instrument shown by the testimony of both or either of the subscribing witnesses, to be invalid as a will ? Now, first, as to Mary Crittenden, their Lordships are of opinion that her testimony taken alone cannot be considered as proving that the signature of either of the witnesses preceded in time the signature of Captain Cooper. It is consistent with her evidence, at least so far as her evidence is positive, to suppose that what she saw him write was—"Witnesses to the said \*will. Signature," or "9, Pall Mall East, servants at house," and not his name. She says—"He wrote something, but what it was I cannot say, for my husband was standing near him, and in the way ;" and it is not to be necessarily inferred from the words which she says were spoken by him, that it was his name that he then wrote. The same may be stated of what she says of the blank space to the right : when she first mentions it, she says, "It was a blank space all to the right, as well as I recollect when I signed my name." And she answers the third and fourth interrogatories thus : "I cannot say whether Captain Cooper signed his will in my presence, or not ; I did not see what he wrote, but he said, 'This is my name, in your presence,' and so I suppose he had written his name when he said so. I do not recollect the words he used better than I have told them. My husband and I were both

[ \*436 ]

present at the time Captain Cooper used those words, and it was after we had signed our names to the will. I cannot say that Captain Cooper's name was signed to the will when I signed it ; as well as I can now remember, it was all blank where I now see Captain Cooper's signature. I have admitted such to be the fact, and so has my husband, I believe, when asked about it." She is not certain what Captain Cooper wrote ; she is not positive as to the blank space, whether where "9, Pall Mall East, servants at house" is now written, may have been blank when she signed. Their Lordships are of opinion that, assuming the law to be as the appellant asserts it to be, assuming George Crittenden's evidence to be out of the case, and assuming the rest of the evidence to be the only evidence, it would be a miscarriage not to conclude that Captain Cooper's signature preceded in \*time the signature of each of the subscribing witnesses.

COOPER  
\*  
BOCKETT.

[ \*437 ]

With regard, however, to the testimony of George Crittenden, he must be taken certainly to depose that Captain Cooper's signature was subsequent in time to each of the other signatures. And, as both the witnesses ought and are to be considered as respectable persons, speaking honestly and sincerely, this does create difficulty. In the first article, he deposes thus. (His Honour here read the whole deposition, as above given, and also his answers to the third and fourth interrogatories.)

Now, perhaps, it may be thought that the main difficulty as to the matter of fact, is substantially created by the statements of this witness, as to the letter "R" at the commencement of Captain Cooper's name. If these passages had been out of the case, saying, as the witness does, that he did not see all that Captain Cooper wrote, and adding afterwards, as the witness does, "He wrote nothing but his name, at least I believe it was his name, in our presence," it may be that the evidence of the husband would, in effect, have left the matter much as it is left by the evidence of the wife. But, however this might have been, the particularity at least with which he mentions the letter "R" (certainly a conspicuous letter as written by Captain Cooper) does give his evidence an importance, plainly beyond hers. Still, what he says on the subject, though to be received with the consideration, and attention, justly due to the assertion of a respectable man, must also be received with the caution which the interests of society require, to be used with regard to the evidence of a witness, in any rank or class, deposing to such a fact under such circumstances. The

COOPER  
v.  
BOCKETT.  
[ \*438 ]

\*mere remark, that had it not been practicable to obtain the evidence of either of the two subscribing witnesses, it is admitted; and that had it been impracticable to obtain the testimony of George Crittenden, it is not improbable, that the instrument in question must have been established as Captain Cooper's will, may of itself be of little or no weight; still, whatever its value, it belongs to the case. But certainly it is not to be forgotten that fraud is out of the question; that Captain Cooper certainly intended the instrument to be his will; intended it to be effectual as his will; that he knew, or believed, his own signature to the paper to be essential, or advisable, and desirable at least; that he knew, or believed, the signature of two subscribing witnesses to be also essential, or advisable, and desirable at least; that the purpose for which, and the object with which, he summoned these two servants to his room, and caused them to sign their names, was merely to substantiate the instrument as his will; that if they have not attested it effectually, their presence—their signature—and the whole transaction, was idle and useless, and the intended testator's design and wishes, have been absolutely and irremediably frustrated. It is the duty of a court of justice, not to allow undue weight to these considerations. It seems equally its duty, not wholly to lose sight of them.

[ \*439 ]

Their Lordships have next had to consider whether, independently of them, the supposed fact thus stated by the porter is, or is not, in its nature improbable. Their Lordships think it in its nature very improbable: they think that it is not according to the general notions or habits of men of the world, or well-educated or well-informed persons, whether professional \*or unprofessional, to have a document, which requires a party's signature, attested or subscribed by a witness before its signature by the party, and for the party to sign it afterwards. It appears to their Lordships that such a course is neither business-like nor customary, and that it does not need that a man should be a lawyer or a merchant, to be startled by such a mode of proceeding. Their Lordships find themselves unable to think it consistent with probability that Captain Cooper, on the occasion in question, could have acted, or allowed the witnesses to act, or could have been capable of acting, or allowed them to act, in such a manner; not that it is their opinion that he was fully aware, or accurately informed, of the legal formalities or ceremonies essential to the sufficient execution or attestation of a will. Their impression, especially when they consider the short, unattested codicil, is rather that he was not so.

COOPER  
v.  
BOCKETT.

The improbable, however, is not always the untrue, and their Lordships have thought it right next to inquire, whether it may reasonably be supposed as not unlikely, that the exact particulars and course of the transaction may not have been accurately remembered by the witness; they think that it may. They cannot avoid observing his station in society, his probable habits of life, his probable degree of education and knowledge; they cannot but be aware how very difficult it is for any man, of whatever rank or class, (not gifted with uncommon faculties of mind,) to remember with precision and clearness, the exact particulars and order of a set of circumstances, not involving his own feelings or interests, at a distance of some months from their occurrence; where no memorandum has been made, and where the circumstances are not of a kind or description, with which \*his own studies or habits of life have rendered him conversant or familiar. To these considerations must be added those due to George Crittenden's deposition. To the second article, which is thus (His Honour read the answer as above set forth).

[ \*440 ]

Their Lordships are satisfied that the evidence of this witness, however respectable, with regard to the minute particulars of the transaction to which he deposes, and especially as to the order of the signatures, ought to be received with caution and great reserve, if it were open only to the observations that have been made. There remains, however, another remark. It is inconsistent, their Lordships think, with a right interpretation of the evidence of George Crittenden, and inconsistent with that of his wife, to suppose that the long line drawn above the testator's signature and continued in a curve between the signatures of the witnesses on the left, and the signature of Captain Cooper, was made with his pen after George Crittenden had signed. Upon careful and repeated inspection, however, of the original document, their Lordships saw reason for thinking it probable that the last letter of his name is written upon (that is over) the line. If so, unless the signature was retouched with ink after the line had been drawn, the unavoidable inference is, that the signature was in time preceded by the line. But it is not, in their Lordships' opinion, reasonable to suppose, upon the materials before them, that the name was retouched with ink after the line had been drawn; and if it was not, and if they are not deceived in the appearance of the document, there is a mistake in the evidence, of the witness or each of the witnesses, upon whose precise and accurate recollection, of the



COOPER  
v.  
ROCKETT.

particular nature and order of the minute facts in question, the appellant is obliged to rely.

[ 441 ]

Their Lordships thinking this not an immaterial consideration in a case such as the present, and unwilling to trust entirely to their own impression as to the aspect of the paper, have submitted it to the inspection and opinion of a witness professionally conversant with the examination of writings and experienced in that employment. The witness views it as their Lordships were and are disposed to view it.

Upon this evidence, and the appearance of the document, their Lordships think that George Crittenden is in error, when he states the line to have been made after he had signed his name; and that if some part of the circumstances of the transaction is impressed on his recollection in an inaccurate manner, his memory cannot be trusted as a safe guide with respect to the rest of the details.

It may possibly be, as has already been intimated, that if the testator signed first, and the witnesses afterwards, the testator, after their signatures, when writing something on the paper, or looking down upon it, may have said, "This is my name, in your presence," for the purpose of a more clear recognition of his signature, or of making a stronger impression upon the minds of the witnesses, and that they may have been misled by this, as to the order and time of his signature. But, without relying or laying stress upon any mere conjecture, as to the cause or causes of error, their Lordships, after weighing all the considerations properly belonging to the case, and without giving, as they do not mean to give, any opinion upon the disputed point of law, have, upon the point of fact, come to the conclusion that they ought not to rely upon George Crittenden's recollection as to the order of the signature, and that the sentence of the \*Prerogative Court ought not to be disturbed, and they must advise her Majesty accordingly. But the appeal seems to them sufficiently reasonable to warrant them in recommending that the costs of it, on both sides, should be paid out of the estate.

[ \*442 ]

They have heard no argument, and give no opinion, upon the question still open, whether the erasures and alterations, on the face of the instrument, are to be considered as made effectually, so that the Probate should recognize them.

In accordance with this judgment, their Lordships reported their opinion to her Majesty, against the prayer of the appellant, viz.,

that the deceased had died intestate; and further, that they were of opinion, that the principal cause ought to be retained, and that the will of the testator ought to be pronounced to have been executed; but that the question of the validity of the interlineations, obliterations, and alterations, now appearing therein, ought to be reserved, and that a monition for the transmission of the original will ought to be issued.

COOPER  
v.  
BOOKETT.

The effect of the judgment being to determine the preliminary question, by establishing the validity of the will; Thomas Cooper, a legatee, and the Rev. Jermyn Pratt, one of the ultimate contingent residuary legatees named in the will, two of the parties cited to see proceedings, appeared as interveners, and asserted separate allegations. The intervener Cooper, in the tenor of his allegation, asserted that the alterations and obliterations occurring in the will, affecting his interest, were made by the deceased prior to execution. The Rev. Jermyn Pratt also alleged that the alterations and obliterations occurring in the said will, affecting his interest, \*were made by the said deceased prior to the execution thereof. He examined two witnesses, Henry Adlard and Joshua Bacon, engravers by trade, and experienced in examining, comparing, and decyphering writings of all kinds. To the third article exhibited to him, Adlard said, "According to my judgment, the whole of the will produced to me was written throughout at one time, without any of the alterations which now appear in it, except the word 'whom,' which appears to have been written at the same time. I say so, because the ink in which that word is written blends with the ink written underneath, showing that it must have been written before the other word was dry; and, according to my judgment, the signature 'R. H. S. Cooper' was written at the same time as the rest of the will; and I come to that conclusion, because I observe the upper part of the capital letter 'R,' that the ink blends, or runs, with the ink of the letters 'dred' in the word 'hundred,' showing that the signature, or that portion of the signature, at least, was written before the letters 'dred' were dry. According to my judgment, the words in the ninth and tenth lines (relating to the substitution of Captain Symonds for the Pratt family), which I have specified, and by which the words originally written are defaced, were written at a different time, and after the will was completely written—some time afterwards, according to my belief, because I can separate the two inks; therefore the ink of the words

[ \*443 ]

COOPER  
v.  
BOCKETT.

[ \*444 ]

defaced must have been completely dry before the words written upon them were written: it must have been perfectly dry before the words written over them were written. The outline of the words superscribed is as sharp and marked upon the ink underneath, as upon \*the paper itself. The ink itself is a different ink, in my opinion, but there is nothing to guide me, in saying whether the signature of the witnesses was made before or after the alterations." To the fourth article, he said: "The will which I have deposed to has the appearance of having been at one time enclosed in a different envelope from that now produced to me by the examiner. Folding up to enclose it in that envelope, I find that the wax not forming part of the impression, the other part of which is on the envelope, has no corresponding mark or stain on the envelope, and must have been made by the use of wax when the will was sealed in some other envelope."

The other witness, Bacon, confirmed and agreed in this opinion.

The intervener Pratt prayed that probate of the will might be granted to the executors, as originally written in the 9th, 10th, and 11th lines, for the following reasons:

Because the alterations in question were made after the execution of the will; because the presumption and policy of the law is opposed to all unattested alterations, and it cannot be held in this case that "the words or effect of the will before such alterations" is not "apparent," within sect. 21 of stat. 1 Vict. c. 26.

[ \*445 ]

The evidence entered into on behalf of the intervener Thomas Cooper, went only to prove that he was a cousin to the testator, and that the testator was in the habit of occasionally visiting him, and of giving him pecuniary assistance. He prayed their Lordships to pronounce against the obliteration of the legacy to him, and that it should stand as part of the last will and testament, for the following reason: Because \*the presumption in law, as well as the result of the evidence in the cause, is, that the obliteration of the words in question was made after the execution of the will. The respondent prayed (in pain of parties cited) their Lordships to affirm the sentence of the Court below, which decreed probate of the will, with the several alterations appearing therein.

1846.  
Feb. 7 (1).

The case now came on to be argued, upon the question as to the validity of the alterations.

(1) Present: The Lord President Knight Bruce, and the Right Hon. (the Duke of Buccleuch), Lord Dr. Lushington. Brougham, the Vice-Chancellor

*Mr. Peacock* and *Dr. Bayford* for the intervener, *Thomas Cooper* :

COOPER  
v.  
ROCKETT.

The question now before the Court is, in what form the will is to be admitted to probate, whether with or without the alterations. The party who upholds the validity of alterations, or obliterations, is bound to give some explanation as to their having been made, at the time of the execution of the will. But the evidence he has given amounts to nothing, for there could not have been the extensive obliterations on the will at the time of its execution, and the witnesses not have taken notice of them.

(THE VICE-CHANCELLOR KNIGHT BRUCE : The presumption should rather be, that the testator did make the alterations before the attestation of the will.)

We admit, that prior to the statute 1 Vict. c. 26, if an alteration was made in the handwriting of the testator, the presumption was in favour of its having been made prior to the attestation ; but that presumption was only raised because it was in the handwriting of the testator ; but how is it since the statute ? The 21st section says, that alterations \*made prior to execution, are to be noticed by the testator and the witnesses, at the time of the execution ; the presumption of law, therefore, is, that the statute would have been complied with in this respect, if the alterations had been made before execution. The effect of the statute is, to do away with the validity of handwriting. The consequence of holding that the old presumption in favour of alterations, applied to a will in circumstances like the present, would be, that a will duly attested according to the late Act might be altered by an alteration not attested in accordance with that statute.

[ \*446 ]

(LORD BROUGHAM : The same reason holds, why a second stamp is necessary in an altered bill, as why a second attestation is necessary in an altered will : it is a new instrument.)

So, if alterations or obliterations appear in any material part of a bill of exchange, the alteration in which might, by possibility, have been made after the bill was completed, the plaintiff would be non-suited unless he gave some evidence to show that the alterations and obliterations were made before the bill was completed : *Knight v. Clements* (1). \* \* \*

COOPER  
v.  
BOCKETT.

*Mr. Wigram, Q.C., and Dr. Harding, for Pratt, the other  
intervening party. \* \* \**

[ 447 ]

[ 448 ]

*Mr. Turner, Q.C., and Dr. Jenner for the respondent :*

In the absence of evidence, interlineations in a deed will be presumed to have been made at the time it is executed, and not afterwards (1).

(LORD BROUGHAM : A distinction exists between alterations and interlineations, and between erasures and interlineations : Saunders on Evidence, p. 18.)

The evidence produced is not sufficient to overrule the presumption that the alterations were made at the time of the execution of the will. They cited *Trowel v. Castle* (2), *Fitzgerald v. Lord Fauconberge* (3), Comyns' Dig. tit. Fait, F. 1.

*Mr. Peacock, in reply. \* \* \**

1846.

Aug. 1.

[ 449 ]

LORD BROUGHAM :

His Lordship having stated the facts of the case, said : In these circumstances, two questions arise, one of fact and one of law. First, at what time were the alterations made, by cancelling, superscription, and interlineations : were they made before or after the execution and attestation ? Secondly, if that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as parcel of it, upon the ground that the proof was on those who would impeach them ; and that, until proved to have been made after the execution, they must be taken to have been made before ?

Upon the question of fact, it is clear, and all their Lordships are of that opinion, that there is no proof sufficient to show at what time the alterations were made. Of the two subscribing witnesses, one (George Crittenden) says, that he cannot say whether they were upon the will, or not, when he signed it : he adds, " I have something on my mind that there was something of the kind, too ; but I was confused of mind at the time ; for though I was but signing my name to a will, yet I had never done so before, and I did not know but that trouble might come of it ; and the Captain was a very sharp and severe man, and I was not so much at my ease as

(1) 12 Vin. Abr. p. 58 ; 2 Starkie on Evidence, 271.

(2) 1 Keble, 21, 22.

(3) Fitzgibbon, 207—220.

to observe exactly what occurred, and what appearance the will had. I do firmly believe, however," he concludes, "that there was some black scratching on the will when I signed it." He repeats the same thing in his examination on interrogatories. The other witness, Mary Crittenden, says, "I did not notice whether \*there were or were not any of the alterations which I now see in it."

COOPER  
v.  
BOCKETT.

[ \*450 ]

It is, however, not immaterial to observe, that there is evidence of the testator having taken the will out of the cover in which he had inclosed it when he executed it, for two witnesses swear to the clear opinion that the cover had been changed, as there is a wax mark on the will which has nothing corresponding to it in the seals of the cover in which it was found.

There is, then, no proof whatever of the time at which the alteration was made, nor have we any means of ascertaining whether they were made before the execution. The belief of one witness, George Crittenden, that there was some black scratching on the will when he signed it, amounts to nothing ; for grant it to be so, we have no means whatever of knowing whether it was one of the smaller or of the larger erasures and superscriptions ; and if it was, as is most likely, the larger, we cannot tell whether it was the alteration of the residuary legatees' names, or the erasure of the annuity to Thomas Cooper ; therefore, we are to take it as wholly unknown whether the alterations were made before execution or after. This brings us to the question of law, and here it is obvious to remark that the alterations are most material ; they amount, indeed, to reversing the whole will, for the entire will is a gift of the legacies, subject to certain annuities ; and the first alteration is an entire change of the residuary legatee, and the last is an erasure of one of the annuities. Can anything be more clear than that we ought to know whether the testator executed, and the witnesses subscribed, this \*will as it now exists, or a former will ? for that is precisely the question before us.

[ \*451 ]

If it be said, that whoever impeaches an instrument must prove his grounds of objection, it is obvious to any one, that whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds, and clear up the doubts. If a will, or a note, be tendered in evidence, by a defendant, as a receipt in proof of payment, and there appears an alteration of the sum, or if the party's name be changed, then there must be proof given, of the alteration having been made, before the signature, else the instrument cannot be regarded as genuine.

COOPER  
v.  
ROCKETT.

In the case of a deed, it was formerly the rule, that, when the Court saw, upon inspection, that there was a material erasure or interlineation, the instrument was on that plea refused, and held null, as being a kind of demurrer. But it is said in the books, that afterwards, when deeds became so long, that clerical errors crept, often almost unavoidably, into them, the matter was made a question of evidence, and so left to the jury. We find it, however, laid down by all the authorities, that, even in the case of a deed, the effect of an erasure is important; for, says BULLER, J., (N. P. 255 a,) "If there be any blemish in the deed by rasure or interlineation, the deed ought to be proved though it were above thirty years old, by the witnesses if living, and if they be dead by proving the hand of the witnesses, or at least one of them, and also the hand of the party, to encounter the presumption arising from the blemish of the deed, and this ought more especially to be done, if the deed impute a fraud;" and to the same purport is the passage in Gilbert's Treatise on Evidence, p. 89.

[ 452 ]

That an alteration, if made, though by the testator himself, after execution, and without republication, would be fatal to the will, is clear, and no authority is required to support such a proposition. The Court of Common Pleas so held expressly in a case sent from the Court of Chancery for their opinion: *Larkins v. Larkins*. (1).

If, indeed, we for a moment consider the consequences of holding a contrary doctrine, we must at once be convinced how fatal this would be to the authority of documents, how entirely subversive of the rights of parties, and how completely abrogatory of the statute. A party might change the sums of all the legacies left in a will: he might change the parties' legatees; he might change the parties, the parcels, and the devises, in a will of lands, and all this might be effected without the least knowledge on the part of the testator, who, having given one gift to one person, might be made to give another to the same, or the same to another person. Even if a testator made the alteration after the execution and attestation, it would be a bequest or devise not witnessed; and it is obvious to remark, that he might be of sound and disposing mind at the one period, when the *factum* took place, and wholly incompetent when he made the alteration. The whole protection thrown round parties by the statute would thus be taken away.

One of their Lordships, the Vice-Chancellor KNIGHT BRUCE, differs in this conclusion of law: but the rest of their Lordships consider

that this sentence must be reversed, and probate granted to the will as it appears, and is proved, to have been originally made, before the alterations. It is satisfactory to us, that we find that the attention of the Court below \*had not been directed particularly to the question now disposed of; for the whole report of the case in *Curteis* goes on the question of the *factum*, and not on the alterations. Whether that last point was argued at all, does not appear. The report says, that, after deciding on the *factum*, the Court directed evidence of the nature of the alterations, and thereon decided for probate of the will so altered.

COOPER  
v.  
BOCKETT.

[ \*453 ]



## CHANCERY.

FARRAR *v.* THE EARL OF WINTERTON(1).

(5 Beav. 1—9; S. C. 6 Jur. 204.)

1842.

Jan. 12.

Feb. 23.

*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 1 ]

Notwithstanding s. 23 of the Wills Act (1 Vict. c. 26), a valid contract for sale by a testator of property previously bequeathed by his will works a complete ademption of the bequest, and the testator's lien upon the property for any unpaid purchase-money due under the contract does not pass to the devisee of the property by the bequest under that section.

THE question in this case was, whether a sum of 2,250*l.* 3*s.* 9*d.* belonged to the legal personal representatives or to the devisees of the testatrix Ann Chapman.

She made her will, dated the 17th of December, 1834, and thereby devised certain freehold estates to trustees, for a term of 500 years, on certain trusts; and subject to the term, and to the trusts thereof, to the use of the petitioners Charlotte Chapman, Catherine Chapman, and Jane Chapman, for their respective lives, as tenants in common, and after the death of any one, to the surviving two for their respective lives, as tenants in common, \*and after the death of two, to the surviving one for life; with remainder to Adolphus Cottin, in fee; and she appointed the petitioners executrixes of her will.

[ \*2 ]

She made a codicil of the same date, and, by another codicil, dated the 24th of June, 1838, reciting that Adolphus Cottin was dead, she devised the same freehold estates (subject to the trusts to take effect antecedent to the use in favour of Adolphus Cottin in fee), to the use of the Earl of Winterton for life, with remainder to the use of his children.

On the 8th of January, 1839, the testatrix entered into a contract with Luke Farrar and others; and thereby, in consideration of the sums of 2,250*l.* and 3*l.* 18*s.* to be paid as therein mentioned, she agreed to sell to them the freehold ground therein described, (being part of the freeholds devised by the will and codicil); and it was agreed, that on receiving payment of the purchase-money, the testatrix would, on or before the 26th day of June, 1839, execute a conveyance of the land to the purchasers and their heirs.

The purchase was made by or for the trustees of a Wesleyan chapel, and the purchase-money was to be paid out of certain funds standing in the name of the Accountant-General of the Court of

(1) *In re Clowes* [1893] 1 Ch. 214, [1900] 1 Ch. 801, 69 L. J. Ch. 426, 68 L. T. 395, C. A.; *In re Carter* 82 L. T. 526.

Exchequer; and by an order of that Court, dated the 22nd of April, 1839, it was referred to the Master, to inquire whether the contract was a fit and proper contract to be carried into execution.

FARRAR  
 &  
 THE  
 EARL OF  
 WINTERTON.

The Master, by his report dated the 29th of June, 1839, certified, that the contract was a fit and proper contract to be carried into execution, and that it would be proper to invest part of the funds in Court in the \*purchase; and he found that a good title could be made to the estate.

[ \*3 ]

The report was confirmed on the 5th of July, 1839, and it was then ordered that the Master should settle a proper conveyance; but some of the trustees having died, new trustees were appointed, and before the draft conveyance had been settled or approved, Ann Chapman, the testatrix, died, without having revoked her will and codicils.

At the date of the will and codicils and of the contract, and at the time of the testatrix's death, the legal estate in the freeholds comprised in the contract was vested in Elizabeth Wegg, who, after the death of the testatrix, conveyed it to the trustees of the will.

A bill was afterwards filed by the trustees of the chapel, against the trustees and devisees under the will and codicils, praying for a specific performance of the contract; and by a decree of the Court of Exchequer, dated the 27th of March, 1841, it was declared that the contract ought to be performed, and a conveyance was ordered to be executed to the purchasers; but a question having arisen as to whom the purchase-money belonged, it was ordered that the purchase-money should be carried over to an account, to be entitled, "The account of the personal representatives or devisees of Ann Chapman, deceased."

Certain costs were to be paid out of the funds standing to that account, and the defendants or any other persons were to be at liberty to apply touching the residue of the fund, after paying such costs, as they should be advised.

The petitioners who were, as already stated, the legal personal representatives of the testatrix, now applied to have the residue of the fund transferred to them.

[ 4 ]

The argument turned principally on the effect of the recent Statute of Wills (1 Vict. c. 26), which was applicable to the present case. By the nineteenth section, it is enacted, "that no will shall be revoked by any presumption of an intention, on the ground of an alteration in circumstances."

By the twenty-third section it is enacted, "that no conveyance

FARRAR  
v.  
THE  
EARL OF  
WINTERTON.

or other act, made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of, by will, at the time of his death;" and by the next section, the will is to speak as from the death of the testator.

*Mr. Tinney and Mr. G. Law*, in support of the petition [cited *Wall v. Bright* (1)]:

[ 5 ] The testatrix became entitled to the purchase-money, but had no beneficial interest in the estate at her death. The statute does not apply, for, by the sale, the devise was adeemed, and became inoperative. \* \* If the words be taken literally, the property would pass to the devisee in a case in which the testator, after selling and conveying to the purchaser, took a mortgage on the property or acquired a new interest therein. \* \* They also referred to *Knollys v. Shepherd* (2) as deciding that the devisee of an estate contracted to be sold, was not entitled to the purchase-money beneficially.

*Mr. Pemberton and Mr. Dixon*, for the devisees:

[ \*6 ] Before this statute, a contract to sell revoked the devise in equity, but not at law. The Legislature has now interfered and expressly declared the contrary, and declares that nothing but a revocation under the Act shall prevent the operation of the will on a devised estate, or, such estate and interest, in such real estate as the testator may, at his death, have power to dispose of by will. \*The consequence is, that both the legal and equitable interest passed in the same way as if the testatrix had expressly devised them. The lien on the estate for the unpaid purchase-money, which was a beneficial interest in the estate which the testatrix had the power of devising at the time of her death, therefore passed to the devisees, who can only be compelled to part with the legal estate, upon payment to them of the unpaid purchase-money. There can be no ademption while there is an interest on which the will can operate; *Knollys v. Shepherd* depended on the particular terms of the devise.

*Mr. J. H. Law*, for another party.

(1) 21 R. R. 219 (1 Jac. & W. 500).

(2) Cited 21 R. R. 222 (1 Jac. & W. 499), affirmed in the House of Lords.

*Mr. Tinney*, in reply referred to *Arnald v. Arnald* (1), and an unreported case of *Curre v. Bowyer* (2).

FARRAR  
v.  
THE  
EARL OF  
WINTERTON.  
Feb. 23.

THE MASTER OF THE ROLLS (after stating the circumstances of the case) said :

The petitioners, who are the legal personal representatives \*of the testatrix, now apply to have the residue of the fund transferred to them. They allege that by the contract, the testatrix in equity revoked or annulled the devise : that she ceased in equity to have any interest in the property sold, and that the purchase-money due to her became a part of her personal estate, and was such at the time of her death.

[ \*7 ]

On the other hand, the devisees, stating, as the fact is, that the provisions of the Act for the amendment of the laws with respect to wills, are applicable to the will and codicils of the testatrix, in consequence of the last codicil being executed in the month of June, 1838, insist, that according to the provisions of that Act, the will is not revoked : that, in fact, an interest which would carry with it the purchase-money remained in the testatrix, and make that the subject of the devise.

By the Act, the will speaks from the death of the testator, and all property which a testator possesses at the time of his death passes by the will ; and moreover, there are express enactments, that no will shall be revoked by any presumption of intention on the ground of an alteration in circumstances, or otherwise than as in the Act mentioned, or by another will or codicil, or some writing declaring an intention to revoke the same.

The testatrix entered into a contract, by which she agreed to alienate her whole interest in the estate ; but she did not, in any

(1) 1 Br. C. C. 401.

(2) *CURRE v. BOWYER*.

(5 Beav. 6, n.)

A. contracted to sell an estate ; the contract was valid at his death, but the purchaser lost his right to a specific performance, by subsequent laches : Held, that the estate belonged to the next of kin, and not to the heir-at-law.

THIS case was thus stated by *Mr. Tinney*, who had been counsel in the cause : A party entered into a contract for the sale of a real estate, and after-

wards died before it had been completed. After the lapse of many years, the purchaser filed a bill for specific performance. This was resisted on the ground that the contract had been improvident, and had been obtained at an under-value, and by undue influence. Sir JOHN LEACH, however, held that the contract was binding at the death of the vendor, but that by the lapse of time, and by his laches, the purchaser had lost his right to have a specific performance, and that the estate belonged to the next of kin, and not to the heir-at-law.

FARRAR  
v.  
THE  
EARL OF  
WINTERTON.

[ \*8 ]

of the ways pointed out by the Act, revoke the will and codicils ; and because she has not done so, the argument is, that the purchase-money, as representing the estate, passed by the devise ; but revocation, in the manner directed by the Act, is not \*the only mode in which a will may be rendered inoperative.

If she had conveyed the estate, and thereby completed the alienation, the will would have had no operation upon it, or upon the purchase-money ; and it was necessarily admitted, that the will could not, by the devise of the land, have any operation upon that part of the purchase-money, which was actually paid to the testatrix in her lifetime.

The question, whether the devisees can have any interest in that part of the purchase-money which was unpaid, depends on the rights and interests of the testatrix at the time of her death. She had contracted to sell her beneficial interest. In equity she had alienated the land, and instead of her beneficial interest in the land, she had acquired a title to the purchase-money. What was really hers in right and equity was, not the land but the money, of which alone she had a right to dispose ; and though she had a lien upon the land and might have refused to convey till the money was paid, yet that lien was a mere security, in or to which she had no right or interest, except for the purpose of enabling her to obtain the payment of the money. The beneficial interest in the land which she had devised was not at her disposition ; but was, by her act, wholly vested in another, at the time of her death ; and the case is clearly distinguishable from cases, in which testators, notwithstanding conveyances made after the dates of their wills, have retained estates or interests in the property which remain subject to their disposition.

[ \*9 ]

Being of opinion, that by the contract, the testatrix must, in this Court be deemed to have alienated the whole of her beneficial interest in the estate : that at \*the time of her death, she had no beneficial interest in the land at her disposition, and that the will only passes that which was at her disposition, I am of opinion, that the devisees of the land have no interest in the purchase-money, and that the prayer of this petition must be granted.

LANGTON *v.* HORTON.

(5 Beav. 9—22; S. C. 11 L. J. Ch. 233; 6 Jur. 357, 594.)

A bill of sale of a whaler, then absent on a fishing adventure, together with all masts &c. boats, oars, and appurtenances: Held, not to pass the cargo of oil &c. acquired during the adventure.

A bill of sale of a ship, though absolute in its terms, may, notwithstanding the Ship Registry Acts, be, in equity, held a mortgage, if such appears to have been the real intention of the parties.

A mortgagee out of possession of a whaler is not entitled, as against the mortgagor or his assignee of the cargo, to an allowance for the use of the ship.

IN the beginning of the year 1837, the defendant Mr. Birnie, trading under the firm of Alexander Birnie & Co., was considerably indebted to the defendant Mr. Horton. The debt was secured by acceptances of Birnie which were then running, and Birnie, having occasion for further advances, requested Horton to afford him further accommodation.

At that time, Birnie was the owner of a moiety of the ship *Ann* and stores, which was then on a whaling adventure in the South Seas, and with a view to the further accommodation which Birnie required, he addressed to Horton a letter, which was in these words:

“LONDON, 27th January, 1837.

“DEAR SIR,—From the difficulty at present existing in the money market, I am desirous of making the following \*arrangement with you: to grant you a bill of sale of the moiety I hold of the ship *Ann* and stores, and deposit with you a policy of insurance for 3,000*l.* effected in the Marine Insurance Company on that vessel, and to value on you in bills, to the extent of 4,200*l.*, which bills I engage to provide for when at maturity, and I propose to pay, out of the bills drawn on you, my acceptances falling due as under:

“£1,230 7 6 due 1st of February.

490 7 0 6th.

496 5 0 18th of March.

Your further putting me in funds for 850*l.* as soon as you may be able to do, say by the 1st of March,” &c.

The proposal made by this letter was acceded to by Mr. Horton, and was the foundation of the transaction, the effect of which was the subject of contest in this cause. Mr. Horton accepted four bills of exchange, which were drawn upon him by Birnie for several sums amounting in the whole to 4,200*l.*, and which were made payable at three and four months. Mr. Birnie executed a bill of sale, dated the 27th of January, 1837, whereby it was purported, that in

1841.

Dec. 7, 20.

1842.

Jan. 14, 15.

April 18.

Rolls Court.

Lord  
LANGDALE,  
M.R.

[ 9 ]

[ \*10 ]

LANGTON  
v.  
HORTON.

consideration of 4,200*l.* paid by Horton to Birnie, he, Birnie, granted and sold to Horton, his thirty-two sixty-fourth parts of the ship *Ann*, then on a voyage to the Southern Whale Fishery, together with thirty-two sixty-fourth parts of all and singular the masts, sails, sail-yards, anchors, cables, ropes, cords, guns, gun-powder, ammunition, small arms, tackle, apparel, boats, oars, and appurtenances whatsoever to the ship belonging, or in anywise appertaining, to hold the same to Horton, his executors, administrators, and assigns, to his and their own use, and as his and their own proper goods and chattels for ever. He covenanted for further assurance. Birnie at the same time deposited the policy of assurance with Horton, who, on \*the 1st of February, 1837, caused the bill of sale to be duly registered at the Custom-house.

[ \*11 ]

The four bills were not paid when they came to maturity, but were renewed four several times, the stamps, interest, and commission being charged to Birnie.

On the occasion of the last renewal, Horton became the drawer and Birnie the acceptor of the bills. In June, 1838, Birnie became insolvent, and he neither paid the substituted bills nor provided funds for their payment.

Down to his insolvency Birnie acted as the owner of the ship, and he, with the knowledge of Horton, made payments on behalf of the seamen, and for keeping up the insurance on the ship.

After the insolvency Horton claimed to be the absolute owner. On the 23rd of June, 1838, he wrote to the captain stating that he had become the owner, and from that time continued to make the different payments on behalf of the ship, and for the insurance, and, in short, acted as the absolute owner.

In July, 1839, Birnie assigned the same half of the ship, and also of the oil and cargo to the plaintiffs for securing 3,000*l.*, and they immediately gave notice to the defendant. The plaintiffs tendered their mortgage at the Custom-house for registration, but the comptroller refused to register it, on the ground that the defendant Horton appeared on the register to be the absolute owner of the ship.

The ship having arrived in London on the 9th of July, 1839, the defendant took possession of it and of the cargo, and he afterwards sold them, and retained the produce.

[ 12 ]

The plaintiffs, alleging that the bill of sale of the 27th of January, 1837, though absolute in form, was intended to operate only by way of mortgage, or security for payment of the bills which

had been accepted by Mr. Horton, and that the bill of sale comprised only Birnie's moiety of the ship, tackle, and appurtenances, and did not give to Mr. Horton any interest whatever in the cargo, filed this bill against Horton and Birnie, whereby they prayed for an account of the cargo brought home by the ship *Ann*, and of the monies received in respect thereof by the defendant Horton; and that Horton might be decreed to pay to the plaintiffs, as trustees under the indenture of July, 1839, executed by the defendant Birnie, a moiety of the residue of such monies, after deducting a due proportion of payments made by him on account of the master and crew of the ship, and of the insurances; and might be decreed to deliver up to the plaintiffs any part of the moiety of the cargo which might remain unsold; and that an account might be taken of the money due to Horton on mortgage of the moiety of the ship, and for other relief.

LANGTON  
v.  
HORTON.

\* \* \* \* \*

There was some parol evidence entered into as to the intention of Birnie and Horton when they entered into the arrangement of the 27th of January, 1837, which it is not necessary to state, as the Court, as will be seen in the judgment, concluded, from the whole of the circumstances, that a mortgage and not a sale was intended by the parties.

[ 13 ]

The amount of the debt due from Birnie to Horton, was admitted to exceed the value of the half of the ship and appurtenances, exclusive of the cargo.

\* \* \* \* \*

The bill of sale to Horton did not profess to pass the cargo acquired or to be acquired. The words "all \*masts &c. and appurtenances" are insufficient for that purpose, and the expression "appurtenances," must be construed with reference to the other words with which it is associated, and which relate to the equipment only. Again, cargo acquired by a ship, will not pass as incidental to a ship; it is not like freight which is the mere rent for the use of the ship, but is the result of a trading speculation of the owner. \* \* \*

[ \*14 ]

*Mr. G. Turner, Mr. J. Russell, and Mr. E. R. Adams*, for the defendant Horton, contended that the transaction was one of conditional sale, and not of mortgage. [They cited *Goodman v. Grierson* (1) and other cases on that point.]



LANGTON  
v.  
HORTON.  
[ 15 ]

Secondly, that the oil and other cargo passed by the assignment, as one of the "appurtenances." [They cited *Morrison v. Parsons* (1), *Case v. Davidson* (2), and other cases mentioned in the judgment on that point.]

Thirdly, that the registry was conclusive evidence of the ownership: *Ex parte Yallop* (3); and that, on principles of public policy, the Court could not give relief against the evidence of the registry. [They cited *Mestaer v. Gillespie* (4), and other cases on that point.]

[ 16 ]

*Mr. Rolt*, for the defendant Birnie, supported the plaintiffs' case.

*Mr. Pemberton*, in reply.

April 18.

THE MASTER OF THE ROLLS:

As it is admitted that the debt due from Birnie to Horton exceeds the whole value of Birnie's moiety of the ship and appurtenances, exclusively of the cargo, it is clear that if there were no question as to the cargo, it would be immaterial to either party whether the transaction ought to be deemed a sale or mortgage, because, in either case, Horton would be entitled to the whole value of Birnie's moiety of the ship and appurtenances.

I have, however, thought it right to consider what was the intention of those parties, and the nature of the contract between them, independently of the mere legal effect of the bill of sale.

[ \*17 ]

From the claims which they respectively make, it is plain that the bill of sale does not constitute, or is not \*evidence of the whole contract which subsisted between them. Even the case of *Mr. Horton* requires him to go out of the bill of sale, to support his proposition that the sale was conditional; and on considering the transactions which took place between *Mr. Birnie* and *Mr. Horton*, from the date of Birnie's letter the 27th day of January, 1837, until the time when Birnie's embarrassments became fully known, I have no doubt the transaction was intended to be, and was by both parties understood to be, a security or mortgage, and not otherwise a sale absolute or conditional. If, as Horton says, the ship was intended to be Horton's unless Birnie provided cash for the bills when at maturity, and if cash was not then provided for them, then, according to his case, the moiety would have become

(1) 11 R. R. 622 (2 Taunt. 407).

(3 Beav. 343).

(2) 17 R. R. 280 (5 M. & S. 79), but see *Stephenson v. Dowson*, 52 R. R. 149.

(3) 10 R. R. 24 (15 Ves. 60).

(4) 8 R. R. 261 (11 Ves. 626).

absolutely his, on the bills becoming due and not being paid; but no such claim was then made by Horton. Birnie wanted cash to take up the bills, and he obtained cash upon renewed acceptances granted by Horton himself. In one view of this case it might be considered, that Birnie having provided cash, though with Horton's assistance, had performed the alleged condition, and so was entitled to a retransfer of a moiety of the ship, and that the bill of sale was continued, or a retransfer not called for, in order that there might be security for the payment of the renewed acceptances; but there is no evidence of any new agreement, and Birnie was from time to time charged with commission, with stamps, and with the expense of renewals; the insurance was continued in his name, and he made payments and allowances to the families of the sailors. All these acts are consistent with his being owner, subject to a mortgage, or security, but wholly inconsistent with the notion of Horton having become the owner by breach of condition; and having regard to them, and the other evidence in the cause, I am of opinion that this was intended and \*understood to be, not a sale absolute or conditional, otherwise than as a sale for the purpose of mortgage or security is to be considered as a conditional sale; and even if the transaction were to be considered as a conditional sale in the sense that the ship might be redeemed only in a limited time and by the performance of a particular condition, I incline to think, that by the transaction which subsequently took place between the parties, the condition ought to be considered as waived, and that Birnie was entitled to redeem on payment of what was due on the bills.

LANGTON  
v.  
HORTON.

[ \*18 ]

But it was argued, that whatever might be the intention of the parties, the transaction must, under the Ship Registry Acts, be deemed to be an absolute sale entitling Horton to the property as purchaser, notwithstanding any contract of his to permit Birnie to redeem, and that this Court ought not to interfere in such a case as this, nor indeed in any case, however fraudulent.

The statute of the 3 & 4 Will. IV. c. 55, ss. 35, 42, 43, provides, that the bill of sale of a ship or any share thereof, after the particulars have been entered in the Book of Registry, shall be valid and effectual to pass the property thereby intended to be transferred, against every person and to all intents and purposes, except subsequent purchasers and mortgagees, who shall first procure an indorsement to be made on the certificate, as in the Act mentioned; and further provides, that in the case of mortgages,

LANGTON  
 F.  
 HORTON.

the collector and comptroller of the port where the ship is registered, shall, in the entry in the Book of Registry, and also on the certificate of registry, express that the transfer was made only as security or by way of mortgage; and that in such cases, and except for certain purposes, the mortgagor and not the mortgagee shall be deemed to be the owner of the ship, \*and that the rights of the mortgagee are not to be affected by the bankruptcy of the mortgagor, notwithstanding his reputed ownership.

[ \*19 ]

When the transfer is not expressed to be by way of mortgage and security, the protection, which the Act intended to afford to the mortgagee against the creditors of a bankrupt shipowner, is not obtained, and the vendee, appearing on the registry to be owner, may be subject to all the liabilities which belong to him in that character; but it may, I think, well be doubted, whether, under the provisions of the Act, there can be any valid mortgage, in any case, in which the parties do not secure to themselves the protection which the statute gives by the mode of proceeding which is therein directed. I do not, however, think that the circumstances of this case make it necessary for me to express any opinion on the subject.

As I have already stated, the only question which is to be decided with a view to the relief prayed, is, whether Mr. Horton has any interest in the cargo.

The bill of sale purported to grant the moiety of the ship masts, sails, tackle, apparel, boats, oars, and appurtenances.

It is admitted, that independently of special contract, the sale or mortgage of a ship will carry freight accruing due at the time of the sale, or after possession is taken by a mortgagee. And upon the hypothesis of sale it is argued that, by the word "appurtenances," all stores would pass, and that the ship and stores having become the property of Horton, he became entitled to the subsequently acquired cargo. It is said, that, in the voyages or adventures of whale ships, the cargo \*constitutes the whole earnings of the ship; that such earnings are incident to the ship as much as freight, and that no distinction can be made between subsequently acquired cargo and subsequently earned freight.

[ \*20 ]

The case upon the ship *Dundee*, upon which we have judgments by Lord STOWELL (1) and by Lord TENTERDEN (2), has only gone to the extent of establishing, that under the Act 53 Geo. III. c. 159, in the expression, "the ship and her appurtenances," the word "appurtenances" must be construed to extend to any thing

(1) 1 Hagg. 109, 126.

(2) 29 R. R. 203 (5 B. & C. 162).

belonging to the owners, which is on board a ship, for the accomplishment of the object of the voyage and adventure on which she is engaged. But the cargo is itself the object and purpose of the adventure, not something provided as a means for the attainment of the object. I cannot construe the cargo as something appurtenant to the ship, although it is that which the ship carries, and for the attainment of which the ship and its appurtenances were provided. And I cannot consider cargo of this kind as freight incident to the employment of the ship, and as necessarily passing by the transfer on sale.

Freight is the reward which the law gives for carrying goods. It arises upon a contract for the conveyance of merchandise, which is said to be in its nature an entire contract, so that, as a general rule subject to some exceptions and to special agreements, until the contract is completed by the delivery of the goods at the place of destination, nothing can be demanded for the freight. When a ship at sea is sold, the seller is subject to an obligation, as well as entitled to a profit, in respect of the freight accruing due. And the duty and the profit \*may well be held to pass together with the ship, by means of which the duty is to be performed, and the profit to be acquired. Nevertheless, the title to the freight and the title to the ship are often separate, and the argument founded on analogy to the case of freight does not rest on a sure foundation.

The cargo of a whale ship is an acquisition, from time to time, made by the employment of the ship and of the crew; but there is nothing in the nature of a contract for the conveyance of merchandise; the employment of the ship is not governed by a contract with other persons, but subject to the directions of the owners, who may be under no obligations to complete the voyage, or to continue the employment of the ship, any longer than suits their own convenience or interests. Supposing that, at the time of sale, the ship is engaged on her adventure, such, if any, part of the cargo as is then acquired is already the property of the owners, and if intended to be sold, ought to be expressly named or described in the transfer; and as to such parts of the cargo as may be afterwards acquired, it is acquired under the directions, and by means of liabilities of the owners, which, as it appears to me, do not necessarily enure to the benefit of the purchaser, without an express stipulation for the purpose. Between the inconveniences of determining, in the absence of express contract, what may be due to the purchaser for the employment of the ship, in acquiring

LANGTON  
v.  
HORTON.

[ \*21 ]

LANGTON  
HORTON.

a cargo for the seller after the sale, and the inconvenience of giving to the purchaser, under the description of the ship, the uncertain cargo acquired at the time of the sale, and which may afterwards be acquired, I incline to think that the first is the least; but, independently of that, it does not appear to me that the cargo of a ship, or that which it carries, can \*be considered as part of, or as an incident to the ship itself.

[ \*22 ]

I am therefore of opinion that it does not pass by an assignment of the ship and its appurtenances without any specification or allusion to the cargo. And that the plaintiffs are entitled to the account which they ask of the moiety of the cargo.

*Mr. Turner* asked that an allowance might be made to the defendant for the use of the ship during the whaling expedition.

THE MASTER OF THE ROLLS:

That claim would depend on the transaction being a sale. I am of opinion that it was a mortgage. If it becomes necessary, I must so decide it.

1842.  
Feb. 26.  
March 3.

### COOKSON *v.* REAY.

(5 Beav. 22—34.)

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 22 ]

[SEE the report of this case on appeal to the House of Lords under the title of *Cookson v. Cookson*, in 12 Cl. & Fin. 121, where some passages from the judgment of the MASTER OF THE ROLLS, reported in 5 Beavan, will be found, and where part of that judgment was questioned on the appeal.]

1842.  
March 5.

### ACEY *v.* SIMPSON (1).

(5 Beav. 35—36.)

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 35 ]

A legacy to a widow in lieu of dower or thirds at common law or by custom, has no priority over other legacies, where the testator leaves no real estate.

A TESTATOR gave his widow a legacy of 50*l.*, and an annuity of 100*l.* for life; and he declared that the said annuity should be paid without any deduction, “and should be accepted and taken by his said wife in lieu and full satisfaction of and for all dower or thirds

(1) And since the Dower Act the widow's priority is dependent upon her having an enforceable claim to dower: *In re Greenwood* [1892] 2 Ch. 295, 61 L. J. Ch. 558, 67 L. T. 76.—O. A. S.

at common law or by custom, which she might otherwise claim from or upon all or any of his real estates.”

ACKY  
v.  
SIMPSON.

There was a deficiency of assets to pay all the legacies; and the question was, whether the usual rule was to prevail, that the widow's annuity should take in priority of the other legacies (1).

It appeared that there were no real estates out of which the widow was dowable.

Mr. Pemberton and Mr. Mylne, for the plaintiff, insisted, that the widow was not a purchaser, as there were no real estates, and that she ought to come in *pari passu* with the other legatees.

Mr. Kindersley and Mr. Smythe, for the widow, admitted that [ 36 ] they could not successfully maintain the contrary.

The MASTER OF THE ROLLS was of the same opinion, and decreed accordingly.

## UNDERWOOD v. HATTON.

(5 Beav. 36—40.)

An estate was administered under the Court, and all claims being provided for, the devisee was let into possession. A further claim was afterwards made against the estate. Held that the trustees of the will were not justified, of their own authority, in taking possession to provide for it.

Where the Court administers the assets, the trustees are protected against all claims on the testator's estate, but legatees still remain liable in respect of their beneficial interest.

THIS petition was presented by William Underwood, the devisee, and Elizabeth Arrowsmith, the annuitant under the will of William Underwood, deceased, and it prayed that John Hatton, one of the trustees under the same will, might pay to Elizabeth Arrowsmith a half year's payment in respect of her annuity, and to the petitioner William Underwood the remainder of the Michaelmas rent received by Hatton, and that the trustees might be directed not to interfere with the possession of the house, or the receipt of the rents of the house.

The testator, William Underwood, died in February, 1830, having made a will, whereby he gave and devised his estates to John Hatton and John Craven, on trust to pay his debts and legacies, and out of the rent of a copyhold house at Cheltenham to pay 50*l.* a year to Elizabeth Arrowsmith for life; to maintain the plaintiff

(1) See *Heath v. Dendy*, 25 R. B. 135 (1 Russ. 543), and the cases there cited.

1841.  
Dec. 24.  
1842.  
March 9.  
—  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 36 ]

UNDERWOOD v. HATTON. out of the residue of the rents, till he attained the age of twenty-three years, to accumulate the remainder for his benefit, and after he attained that age, to suffer him to receive the rents for his life, subject to the payment of the annuity of 50*l.* to Elizabeth Arrowsmith, and, after his death, upon certain other trusts.

[ 37 ] By a decree in the Court of Exchequer pronounced in 1833, the will was established, the usual accounts were directed to be taken, and a receiver of the rents and profits of the copyhold estate at Cheltenham was appointed.

The Master reported that no debts had been proved before him, but that certain sums were due to the defendants Hatton and Craven and to certain legatees. By the decree on further directions dated the 18th of February, 1834, directions were given for payment of the costs of suit, and of the sums due to Hatton and Craven, and it was ordered that the receiver should be continued, and declared that William Underwood, on attaining his age of twenty-three years, would be entitled to the accumulations of the personal estate, and to the accumulations of the rents of the real estate; and, subject to the annuity to Elizabeth Arrowsmith, would be entitled to the rents and profits of the real estate for his life.

The plaintiff having attained his age of twenty-three years on the 5th of April, 1834, an order was made by the Court of Exchequer in the following month of June, whereby certain sums were ordered to be transferred to him, and the receiver was discharged, and soon afterwards the trustees Hatton and Craven let the plaintiff into possession of the estate, and he remained in quiet possession up to the month of September, 1841.

[ \*38 ] It appeared that Underwood, the testator, was the executor of the will of Thomas Wallace, and in April, 1841, the petitioner Underwood was informed by the solicitor of Hatton and Craven, that a part of the funds which had been transferred to the plaintiff under the order of June, 1834, as being part of the estate of Underwood the testator, did, in fact, belong to the estate \*of Wallace; and the plaintiff being, on investigation, satisfied that the information was correct, submitted to the claim, and paid the amount.

But whilst that inquiry was pending, the solicitor of Hatton and Craven called on the plaintiff Underwood to make good other claims, amounting to nearly 120*l.*, which they alleged to be due from the testator Underwood to persons claiming under the will

of Wallace; and the plaintiff having disputed these claims and refused to satisfy them, Hatton and Craven gave notice to the occupying tenant to pay the rent to them, and prevailed on her to do so; and they procured themselves to be admitted to the copyhold premises, with the view of enforcing the claims which they alleged to be just debts; and they insured the premises for 1,050*l.* A half year's annuity, payable to Elizabeth Arrowsmith, not having been paid, this petition was presented by Mr. Underwood and Mrs. Arrowsmith, praying for payment of what was due for the annuity to Mrs. Arrowsmith, and payment of the remainder of the rent to Mr. Underwood, and that the trustees might be directed not to interfere with the possession of the house, or the receipt of the rents of the house.

UNDERWOOD  
v.  
HATTON.

*Mr. Pemberton* and *Mr. Hall*, in support of the petition, said, that the account of the testator's debts had been taken under the decree of the Court of Exchequer, and that no such debt as that now claimed had appeared to be due; that if any such debt ever was due (which they did not admit), it had long since ceased to be recoverable. That the decree of the Court of Exchequer had declared Underwood to be entitled to the rents of the house, subject to the annuity to Elizabeth Arrowsmith, which he had duly and regularly paid; that pursuant to the decree and the right thereby declared, the receiver had been discharged, and Underwood had \*been let into possession, and that his possession could not now be disturbed by the trustees, without violating his rights as declared by the decree; and that if they had any just demand against him in respect of the estate, they should have applied to the Court for relief, and to have the receiver re-appointed.

[ \*39 ]

*Mr. Kindersley* and *Mr. Geldart*, for the defendants Hatton and Craven, alleged, that a debt was really due from the estate of Underwood the testator to the estate of Wallace; and that it was their duty and right, as trustees of the will of Underwood, to pay the debt, and for that purpose to take and hold possession of the property till they had been enabled to pay the debt and the expenses of admittance and insurance.

#### THE MASTER OF THE ROLLS:

March 9.

As the right of the petitioner Underwood has been declared by the Court, in a suit between him and the trustees Hatton and



UNDERWOOD v. HATTON. Craven, his possession, founded upon that right, is not to be disturbed without lawful cause.

It must be admitted, that notwithstanding the accounts which have been taken, and the declaration which has been made, there may still be subsisting lawful and just claims against the estate of the testator Underwood; and if the persons entitled under the will of Wallace have just subsisting claims against the estate of Underwood, there is nothing to prevent them from prosecuting these claims, for although Hatton and Craven, the trustees of Underwood, are protected (1), the petitioner Underwood the devisee is not (2).

[ 40 ] But the claims, if contested by the petitioner, must be established against him; and under the circumstances which have taken place, I do not think that it is enough for the trustees to say, we are satisfied that the debt is due, and you must pay it. I think that the petitioner is not bound by the admission of the trustees and executors, and if he has a just defence to the claim, I think that they have no right to use their powers, arising from the possession of the legal estate, in such a manner as to deprive him of that defence.

Although the accounts have been taken, and the fund was cleared to the satisfaction of the Court, I will not venture to say that all duty of the trustees, except for the petitioner, terminated; because I conceive that circumstances might occur, in which, notwithstanding all that has taken place, it might have been proper, and the duty of the trustees to apply to the Court for directions upon some unexpected contingency; but I am of opinion, that after the proceedings which took place, the trustees had no right, of their own authority, for the purpose of enforcing claims which could not be established against themselves, and by means which would deprive the petitioner of any just defence which he may have, to take the matter into their own hands, and use the legal estate, which ought to be the protection of the petitioners, against them, for the purpose of enforcing an adverse claim.

I must, therefore, order the respondents to account for the rents which they have received; order them not to interfere further with the possession, or with the receipt of the rents of the house; and order them to pay the costs of this petition.

(1) *Knatchbull v. Fearnhead*, 45 R. R. 230 (3 My. & Cr. 126).

(2) *Gillespie v. Alexander*, 27 R. R. 35 (3 Russ. 130).

EVANS *v.* HARRIS.

(5 Beav. 45—47.)

1842.

Feb. 22.

*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 45 ]

A limited fund was given to A. B. until some child of his should attain twenty-one, and 1,000*l.* Consols was to be paid thereout to each of his children as they attained twenty-one. The fund was insufficient to provide for all the children. A child attained twenty-one: Held that he was, notwithstanding the deficiency, entitled to 1,000*l.* Consols.

A. B. had issue at the death of the testatrix. Held, also, that the children born after her death were also entitled.

THE testatrix, by her will, dated in 1819, gave to trustees the sums of 6,000*l.* 3 per cent. Consolidated Bank Annuities, and 5,000*l.* 4 per cent. Bank Annuities, upon trust to pay the dividends to her nephew Solomon Harris during his life or until some child of his should attain his or her age of twenty-one years, and when and as such of his children should attain his or her age of twenty-one years, to pay or transfer to each such child the sum of 1,000*l.* 3 per cent. Consolidated Bank Annuities, out of the principal of the said trust funds, and the dividends of the residue of the said trust funds were to be paid to her said nephew for his life. And from and after his decease, in case he should leave at his decease any child or children under the age of twenty-one years, \*to set apart for each such child the sum of 1,000*l.* 3 per cent. Consolidated Bank Annuities, and apply the dividends thereof towards their maintenance during minority, and to transfer the principal to each such child, when and as he should attain twenty-one years. And in case of the death of any such child before he attained twenty-one, to fall into the residue of the said trust fund.

[ \*46 ]

The testatrix directed the dividends of the trust fund, after satisfying the above legacies, to be paid to the wife of Solomon Harris for life, if living at his death, and after their deaths, she directed the principal to be divided between all the children of Solomon Harris who should be then living.

The testatrix died in 1820. At the time of her death, Solomon Harris had one child living; he afterwards had ten other children, of whom seven were now living, the remaining four having died in their infancy. The plaintiffs were two of his children who, having attained twenty-one, claimed by this bill to be entitled to receive the legacy of 1,000*l.* Consols each out of the trust funds, which now consisted of 5,760*l.* 3 per Cents., and 5,000*l.* 3½ per Cents.

The trustees declined making the payment, on the ground that there would not remain sufficient to provide 1,000*l.* Consols for each of the other children now living, and any other children which

EVANS  
v.  
HARRIS.

Solomon Harris might have during his life. There was also a question, whether the children born after the death of the testatrix were entitled.

*Mr. Pemberton and Mr. Rogers, for the plaintiffs.*

*Mr. Tennant, Mr. Nichols, and Mr. R. W. H. Smith, for the defendants.*

[ 47 ]

*Mr. Rogers, in reply.*

*Defflis v. Goldschmidt* (1), *Butler v. Lowe* (2) were cited.

THE MASTER OF THE ROLLS :

In this case there seems to be a serious difficulty, which the Court must contend with, and get over in the best way it can. I have no doubt at all that this testatrix fully intended that each and every child down to the very last should have 1,000*l.* upon attaining twenty-one.

If, as in the case cited, she had directed a sufficient fund to be provided for answering the gifts to the whole family, then there would have been no difficulty; the difficulty which arises in this case is, that she has provided a limited fund to answer an unlimited object.

What I think ought to be done in this case is, to follow the first directions, which are clear and distinct, and pass over the difficulty which arises from the inferential intention which arises in the case.

There is a most distinct direction to pay the sum of 1,000*l.* Consols out of this fund when each child attains twenty-one, and this must be followed. I think therefore I ought to order the payment of 1,000*l.* Consols to each of the two children who have attained twenty-one.

(1) 13 R. R. 259 (19 Ves. 566).

(2) 51 R. R. 259 (10 Sim. 317).

HEREFORD *v.* RAVENHILL (1).

(5 Beav. 51—55 ; S. C. 11 L. J. Ch. 173.)

A testator directed his trustees, with the consent of his widow, to invest his personal estate in freehold, leasehold, or copyhold messuages, tenements, or hereditaments, and settle them upon certain trusts which were applicable to realty : Held, that a conversion into real estate was intended.

A testator directed a part of his personal estate to be converted into realty, and settled on certain trusts. These being exhausted, and no investment having been made : Held, that the residuary legatee was entitled to the fund, and took it in the character of personality.

THIS case came before the Court for further directions on the Master's report.

Subject to the life estate of his wife, the testator, Howarth Crooke, had an absolute power of appointment over estates at Holmer, Dilwyne, and Lingen.

By his will he devised these estates to his son Charles for life, with remainder to trustees to preserve, &c., with remainder to the first and other sons of Charles in fee, with remainder to the daughters of Charles as tenants in common in fee, with similar limitations to his son John and his sons and daughters ; and in default thereof, the testator devised the estates to certain persons in fee, but which subsequent devises failed by the death of the devisees in the lifetime of the testator ; it is, therefore, unnecessary to state them. The testator also gave his ready money, and money which should be due and owing to him to trustees, in trust, as soon after his decease as a convenient purchase or purchases could be found, by and with the consent and approbation of his wife if she should be then living, signified in writing, otherwise at their own discretion, to lay out and dispose of all such residue and overplus of his ready money, and money which should be so due and owing to him, save as aforesaid, either together or in parcels, in one or more purchase or purchases of freehold, leasehold, or copyhold messuages, lands, tenements, or hereditaments in the county of Hereford, and thereupon settle, convey, \*and assure them “to the use and behoof of his loving wife Mary Crooke for and during her life, and after her decease, then to, for, and upon such or the same and the like uses,” &c., subject to such powers, &c. as were thereinbefore expressed, &c. of and concerning the hereditaments thereinbefore mentioned to be situate in the parishes of Holmer, Dilwyne, and

1842.

*March 12.**Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 51 ]

[ \*52 ]

HEREFORD  
C.  
RAVENHILL.

Lingen ; and he thereby directed his trustees, “ with the approbation of his wife, whilst living, and in case of her decease, at their own discretion, in the meantime and until such purchase or purchases could be procured, to lend and place out all such residue and overplus of his ready money, and money which should be due and owing to him, upon any public or private security at interest, or invest the same, or any part thereof, in the purchase of stock in any of the public funds, subject to the trusts aforesaid.” And he directed that until the ready money, &c. should be laid out in the purchase of hereditaments, &c., the interest thereof should, from time to time, be paid to and received by such person or persons as and to whom the rents and profits of the premises so to be purchased as aforesaid, if purchased and settled would for the time being belong or appertain by virtue of that his will.

And the testator gave and bequeathed the residue of his goods, chattels, and personal estate to his wife absolutely.

The testator died in 1788, leaving Mary Crooke, his widow, John Crooke his heir-at-law, and Charles Crooke his only other child, him surviving. John died in 1794, without issue ; the widow died in 1802 ; and Charles died in 1838, without issue.

[ \*53 ]

The testator's ready money had never been laid out in land by the trustees, but had been invested on mortgage \*and Government securities, and the interest had been paid to the widow during her life, and afterwards to Charles Crooke down to the time of his death, and the question now was, to whom the fund belonged.

The plaintiff, the heir *ex parte maternâ* of Charles Crooke the heir-at-law of the widow, claimed the fund as realty.

The plaintiff and his five sisters, who were made defendants, were the next of kin of Charles Crooke the sole next of kin of the widow. The defendants claimed five sixths of the fund as personality.

*Mr. Pemberton* and *Mr. Stinton*, for the plaintiff, the heir, contended that by the will of the testator the fund had, in the consideration of equity, been converted into realty, and belonged to the heir-at-law, and not to the next of kin. That the limitations were applicable to real estate only, and that the word “leaseholds” either meant leaseholds for lives or leaseholds to be settled to the same uses as the real estate. That the trust imperatively required the investment in land ; and that no subsequent event had occurred to change its quality.

*Mr. Kindersley* and *Mr. Romilly*, *contra*, for the next of kin, argued, that no absolute conversion had been intended; for the trust was not imperative, the trustees having the option of investing in leaseholds, or personalty; and on that ground it was held by Lord LOUGHBOROUGH in *Walker v. Denne* (1) that personalty directed to be so invested was not converted into realty. That if, however, an absolute conversion was intended, it only applied \*to those persons taking under the limitations of the real estate, and the purposes for which the conversion was directed having been satisfied, the residuary legatee took the fund in the character of personalty: *Cogan v. Stephens* (2). That it could not be realty, for then it would belong to the heir of the testator, and not to the heir of the residuary legatee of the personal estate.

HEREFORD  
R. RAVENHILL.

[ \*54 ]

They also contended that if the property were considered as real estate, still the subsequent mode of dealing with the property by the widow, who had received the dividends and adopted the investment, had the effect of reconverting the property into personalty.

They referred to *Cookson v. Reay* (3) and *Earlom v. Saunders* (4).

*Mr. Collins* and *Mr. Bacon*, for other parties.

*Mr. Pemberton*, in reply, admitted the principle of *Cogan v. Stephens*, but said that the decision only proved the exclusion of the heir-at-law of the testator, and did not decide in what character the residuary legatees took the property, or profess to determine the rights of the real and personal representatives of the residuary legatees.

#### THE MASTER OF THE ROLLS:

The first point which is raised here is whether there was a trust for conversion. I am of opinion there was. This case differs from *Walker v. Denne* in this respect, that the leaseholds to be purchased were there expressly directed to be for "very long terms of \*years;" and that circumstance accounts for the decision. Considering, however, the object for which the conversion was to be made in this case, and having regard to all the words which are to be construed, I think a conversion was intended.

[ \*55 ]

There being a trust for conversion, this carries us a very little way in the decision of the real question in this cause; because the

(1) 2 R. R. 185 (2 Ves. Jr. 170).

(3) *Ante*, 404.

(2) 42 R. R. 258 (5 L. J. (N. S.) Ch.

(4) Amb. 240.

17; 1 Beav. 482, n.).

HEREFORD  
v.  
RAVENHILL.

conversion being for certain purposes distinctly stated in the will, which have been satisfied, and others which have failed, the rule that the conversion is only to be to the extent to which the limitations can be carried into effect then comes into operation; and it has been necessarily admitted, that to the extent to which the limitations cannot take effect, the property remains personalty of the testator, and, being so, belongs to the residuary legatee under the will.

If there had been an actual investment in real estate, the ultimate limitation would have been such as to have given the residuary legatee a right to it, and she might have directed it to be limited and disposed of as she thought fit, either to her or her heirs, or in any other way. Unfortunately nothing was done; and we have therefore to consider, what are the rights of the parties independent of any act done by them to explain their intention. Being personal estate in the first instance, as regards the residuary legatee and nothing having been done to alter its quality, I see no reason to conclude, that it was to devolve in a form different from that in which it was left by the testator, or that its character was altered. It must, therefore, be considered as personalty, and consequently belongs to the next of kin, and a declaration to that effect must be accordingly made.

### ASHTON v. M'DOUGALL (1).

(5 Beav. 56—67; S. C. 11 L. J. Ch. 344; 6 Jur. 447.)

1842.  
Feb. 11.  
April 18.  
Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 56 ]

On the marriage of a female infant, her reversionary interest in choses in action was settled under the Court for her separate use for life, with remainder to her children. She afterwards contracted two subsequent marriages, but no further settlement was executed on those occasions. Part of the reversionary interests fell into possession during the first coverture, and part during the second, and were transferred to the trustees: Held, first, that although the deed made during infancy was not binding in respect of the reversionary interests, as against the wife surviving, still she might, while discovert, adopt it if for her benefit. Secondly, that the wife having survived, and not having called for a transfer of the fund, must be deemed to have acquiesced in and adopted it, as it was for her interest to do so. Thirdly, that she must be deemed to have married her second husband on the faith that her property was protected by the settlement, and that he was bound by it. Fourthly, that

(1) *White v. Cox* (1876) 2 Ch. D. *Mercantile Insurance Co.* [1893] 3 387, 45 L. J. Ch. 685, 34 L. T. 418; Ch. 474, 62 L. J. Ch. 918, 69 L. T. 526. *Greenhill v. North British and*

the third husband, who had notice of the settlement previous to his marriage, and had for some years after acquiesced in it, was bound thereby, and had no interest in the settled property; and, fifthly, that the arrears of separate estate due at the time of the third marriage also belonged to the wife as her separate estate.

ASHTON  
v.  
M'DOUGALL.

THE question in this case was, whether the third husband of a lady, who at the time of her first marriage was an infant, took any interest in her property settled on that occasion, part of which consisted of a reversionary interest in choses in action. The facts which gave rise to the question were as follows :

The defendant, Mrs. Ashton, whose maiden name was Susannah Eliza Paddon, was one of the four children of Elizabeth Paddon, a daughter of the testator John Stacie, who, by his will, dated the 3rd day of October, 1812, gave to Trimby and Redman,

A freehold tenement at Bath, on trust to pay the rents to Sarah Russell for life, with remainder in trust for the sole use and benefit of Susannah Eliza Paddon, if living at her death,

The sum of 5,000*l.* 3 per cent. Consolidated Bank Annuities, on trust to pay the dividends to Sarah Russell, for her life, and after her death, to transfer the capital to his granddaughter Susannah Eliza Paddon for her sole use and benefit,

A house in Lamb's Conduit Street, on trust to receive the rents and pay them to Susan Wright during her life, \*if the lease so long lasted; and if she died (the lease continuing) on trust to sell the lease, and stand possessed of the money arising from the sale thereof, on trust to invest the same for the benefit of the children of his daughter Elizabeth Paddon, of whom Susannah Eliza was one,

[ \*57.]

The sum of 5,000*l.* 3 per cent. Annuities, on trust for the separate use of Susan Wright for her life, and after her death for Susannah Eliza Paddon,

A house in St. John Street, and a house in Howland Mews, after the death of Susan Wright, to the children of his daughter Elizabeth Paddon,

The residue of his estate, on trust to pay the income thereof to the children of Mrs. Paddon, to whom he also gave 2,000*l.* 3 per cent. Annuities, and a sum of 400*l.* Long Annuities.

He appointed the trustees executors of his will, and died on the 16th of March, 1815. Trimby alone proved the will. At the testator's death, Mrs. Russell, Mrs. Wright, Mrs. Paddon, and the four children of Mrs. Paddon, were living.

Soon after the testator's death, a suit was instituted, by a legatee



ASHTON  
v.  
M'DOUGALL.

of the name of Gullan, against Trimby the executor, for payment of the legacy, and in that suit the usual accounts of Mr. Stacie's estate were taken.

[ \*58 ]

On the 8th of June, 1818, Susannah Eliza Paddon, being then between seventeen and eighteen years of age, married her first husband James Harnett. Soon after the marriage, a bill was filed on behalf of three other children of Elizabeth Paddon, against the trustees of Mr. Stacie's will, and Mr. and Mrs. Harnett, for a general administration of the estate, and by an order, made in the two causes of *Gullan v. Trimby* and *Paddon v. Trimby* on the 8th of December, 1818, it was referred to the Master to approve of a proper settlement to be made of the fortune of Mrs. Harnett.

A settlement, bearing date the 12th day of July, 1819, and made between James Harnett and Susannah Eliza his wife of the one part, and Alexander M'Dougall and Thomas Dobson of the other part, was afterwards executed, in pursuance of the Master's report.

[ \*59 ]

The settlement recited the will of Stacie, the institution of the legatee's suit, the taking of the accounts; and that, upon taking the accounts, it appeared that the general personal estate was insufficient to pay the general pecuniary and stock legacies in full, and that an apportionment had been made; that the sum of 117*l.* 7*s.* 1*d.* sterling, which was invested in the purchase of 151*l.* 18*s.* 4*d.* 3 per cent. Annuities, had been apportioned to Mrs. Harnett in respect of her share of the legacy of 2,000*l.* 3 per cent. Annuities given to the children of Mrs. Paddon, and was carried to the account of Susannah Eliza Paddon; and that by several orders made in the cause of *Gullan v. Trimby*, the sum of 5,000*l.* 3 per cent. Annuities had been carried over to the account of Sarah Russell for her life, and another sum of 5,000*l.* had been carried over to the account of Susan Wright for her life, and the sum of 100*l.*, part of 400*l.* Long Annuities, had been carried over to the account of Susannah Eliza Paddon; and, after further reciting the order of reference, and the Master's report, it was witnessed, that Harnett covenanted with the trustees, that if his wife should attain twenty-one years, he and his wife would, by fine or otherwise, convey the house at Bath to the trustees of the settlement, upon the trusts therein mentioned; and it was witnessed, that Harnett and wife sold and assigned the 5,000*l.* 3 per cent. Annuities standing to the account of Sarah Russell for life, and Mrs. Harnett's share of the money to arise from the sale of the house in Lamb's Conduit Street, and the 5,000*l.* 3 per cent. Annuities, standing to

the account of Susan Wright for her life, and the sum of 151*l.* 18*s.* 4*d.* 3 per cent. Annuities, and the sum of 100*l.* Long Annuities respectively standing in the name of Susannah Eliza Paddon, and all right and interest of Harnett and wife and each of them in the premises, to hold to the trustees on the trusts therein mentioned. The trusts were, to raise 500*l.* for the use of Harnett, either upon Mrs. Harnett's attaining the age of twenty-one years, or otherwise upon the death of Mrs. Russell or Mrs. Wright. And subject to that, during the life of Mrs. Harnett, to pay the rents of the freehold house and the shares of the messuages thereby assigned, and the interest and dividends of the monies, stocks, and funds, or such part thereof as should be, from time to time, vested in possession, to such person and for such purposes, as Susannah Eliza Harnett should, notwithstanding her present or future coverture, from time to time, when and as the same should become due, but not by way of anticipation, direct or appoint, and in default of appointment, into her own proper hands, for her own sole and separate benefit, free from the controul or interference of the said James Harnett, or any future husband; and after her decease, on trust, if there should be any child or children by Harnett or any future husband or husbands, with whom she might marry after the decease of Harnett, for the benefit of such children.

ASHTON  
M<sup>r</sup>. DOUGALL.

On the 24th of December, 1821, Mrs. Harnett attained her age of twenty-one years; a fine was levied, to the uses of the settlement, of Mrs. Harnett's reversionary interest in the freehold house at Bath, and on the 22nd day of January, 1822, an order was obtained, upon the \*petition of James Harnett, who claimed the benefit of the settlement, for the sale of so much of the Long Annuities then standing in the name of Susannah Eliza Paddon, as would be sufficient to pay the costs of the application, the costs of the fine, and the sum of 500*l.* to be paid to Harnett for his own use.

[ \*60 ]

In January, 1823, Mrs. Russell, the tenant for life of one of the sums of 5,000*l.* 3 per cent. Annuities, died, whereby the interest of Mrs. Harnett in that sum became vested in possession; and on the 29th day of April in the same year, the trustees of the settlement, upon a petition, in which they stated the marriage of James Harnett with Susannah Eliza Paddon, and the settlement which had been made, obtained an order for the transfer of the 5,000*l.* 3 per cent. Annuities, which then stood to the account of Sarah Russell for her life, to the account of Susannah Eliza Paddon;

ASHTON  
v.  
M'DOUGALL.

and it was ordered, that the dividends, subject to the costs of the application, should be paid to the trustees of the settlement. The stock was not carried over under the order, but by virtue of a subsequent order of the 14th of November, 1828, made after the marriage of Mrs. Harnett with a second husband, the stock was carried to the account of the trustees of the settlement.

Mr. Harnett died on the 16th of August, 1828. Very soon afterwards (viz. on the 12th of October, 1828) Mrs. Harnett married Charles Edward Birch.

On the 15th of May, 1829, an order was made for payment of the dividends on the sum of 54*l.* 17*s.* 8*d.* Long Annuities to M'Dougall and Dobson, as trustees of the settlement, during the life of Susannah Eliza Harnett, therein described as then Susannah Eliza Birch, the wife of Charles E. Birch. And by a subsequent [ \*61 ] \*order, dated the 19th of December, 1829, and obtained on the petition of M'Dougall and Dobson, it was ordered that the Long Annuities should be transferred from the account of Susannah Eliza Paddon to M'Dougall and Dobson the trustees of the settlement.

On the 12th of June, 1830, Susan Wright, who was entitled for her life to one of the sums of 5,000*l.* 3 per cent. Annuities, died; and on the 1st day of July, 1830, an order was made on the petition of M'Dougall and Dobson, entitled in a cause in which Charles Edward Birch and Susannah Eliza his wife, late Susannah Eliza Harnett, were stated to be defendants, for the transfer of the 5,000*l.* 3 per cent. Annuities from the account of Susan Wright for her life, to M'Dougall and Dobson, upon the trusts of the settlement of the 12th of July, 1819.

In the year 1830, the leaseholds, in which Mrs. Birch was interested, were sold, and in respect of them, a sum of 142*l.* 15*s.* 3*d.* 3 per cent. Annuities had been transferred into Court since the institution of this suit.

On the 30th of March, 1831, Mr. Birch died. At this time the real estate had been subjected to the settlement by the fine which had been levied in the lifetime of Harnett the first husband; the two sums of 5,000*l.* 3 per cent. Annuities and the Long Annuities had been transferred to, and become vested in, the trustees of the settlement, and were, if the settlement was valid, held by them, on trust for the separate use of Mrs. Birch, with remainder to her children, of which she had four by her first marriage; and the trustees were responsible for the money arising from the sale of the leaseholds.

Mr. Birch having died on the 30th of March, 1831, his widow, on the 18th of June following, married \*the plaintiff. No settlement was executed on their marriage, but the plaintiff had notice of the settlement made in 1819, and by his conduct he acquiesced therein, and after his marriage concurred in the appointment of a new trustee thereunder; he also joined his wife in a power of attorney to enable her agents to receive the dividends from the trustees of the settlement.

ASHTON  
v.  
M'DOUGALL.  
[ \*62 ]

Mrs. Ashton had children by her first and third marriage. Differences having arisen between Mr. and Mrs. Ashton they separated, and, in June, 1838, Mr. Ashton filed this bill, praying in substance, for a declaration that the plaintiff, Robert Ashton, was entitled, in right of his wife during the marriage, to the rents and dividends of the property comprised in the settlement of 1819, which the plaintiff insisted was not binding upon him; and the bill, charging that in respect of the estate and stocks, alleged to be subject to the trusts of the settlement, there had been several breaches of trust, prayed for relief in respect thereof against the defendant, Alexander Henderson M'Dougall, as representative of the deceased trustee of the settlement.

It should also be stated, that the plaintiff made a claim to certain dividends and interest on the property which had accrued between the second and third marriage, and which he alleged had not been paid over by the trustees.

The defendants insisted that the settlement of 1819 was a valid and subsisting settlement; that by the trusts thereof, the defendant, Mrs. Ashton, was entitled to the income of the property therein comprised for her separate use; that the plaintiff had no interest therein, and that his bill ought to be dismissed with costs.

The question in reality was, whether the plaintiff Mr. Ashton took any interest in the property settled on the first marriage.

[ 63 ]

*Mr. Pemberton and Mr. Hubback*, for the plaintiff [cited *Purdew v. Jackson* (1), *Honner v. Morton* (2), *Groves v. Perkins* (3), *Stanton v. Hall* (4), *Tyler v. Lake* (5), and other cases].

*Mr. Kindersley and Mr. Purvis*, for Mrs. Ashton, and *Mr. Tinney and Mr. Bagshawe*, for the trustees :

[ 64 ]

First, as to the leaseholds, it is clear that the settlement was

(1) 25 R. R. 1 (1 Russ. 1).

(4) 34 R. 49 (2 Russ. & My. 175).

(2) 27 R. R. 15 (3 Russ. 65).

(5) 34 R. R. 53 (2 Russ. & My. 183).

(3) 38 R. R. 178 (6 Sim. 576).

ASHTON  
v.  
M'DOUGALL.

binding both on the husband and wife: *Trollope v. Linton* (1), *Donne v. Hart* (2). \* \* From her subsequent conduct when she was no longer under coverture, it is plain that she adopted and confirmed this settlement, and it was not competent either for her or her after-taken husband to defeat it. [The property remained separate estate upon subsequent marriage: *Tullett v. Armstrong* (3).]

[ \*65 ]

Whatever may be the effect of the settlement, the plaintiff has repeatedly acquiesced in it, and dealt with the property on the faith of its validity, he cannot, therefore, now dispute it. The plaintiff has, therefore, no interest in the matter, and the bill ought to be dismissed with costs.

*Mr. G. Turner and Mr. Austen, Mr. Wood and Mr. Lewin, for other parties.*

*Mr. Pemberton, in reply.* \* \* \*

#### THE MASTER OF THE ROLLS :

[ \*66 ]

I do not find any thing, which, as it appears to me, ought to induce a Court to consider the settlement as invalid for the protection of Mrs. Ashton. The first marriage took place during her infancy, and the interests to which she was entitled and which formed the subject of the settlement, were, for the most part, reversionary, and the reversionary interests of a married woman are not assignable as against herself surviving her husband; but an assignment of a reversionary interest which falls into possession during the coverture may be valid, and there seems to be no reason why she may not adopt an assignment made during her coverture, for her own benefit during the whole of her life, and for the benefit of her children after her death. A part of the reversionary interests fell into possession during the life of her first husband, who claimed and received the benefit of the settlement, and was bound by it. After his death, I think that the wife surviving him, and not claiming to have the funds transferred to herself, must be deemed to have acquiesced in and adopted the settlement, as it was for her interest to do. I conceive that she ought to be deemed to have married her second husband, Mr. Birch, on the faith that her property was protected by the settlement, and that he was bound by it. The remainder of her reversionary interests fell into possession during his life, and became subject to the settlement,

(1) 24 R. R. 211 (1 Sim. & St. 477). 360).

(2) 34 R. R. 114 (2 Russ. & My. (3) 48 R. R. 127 (4 My. & Cr. 377).

and so continued to be at the time of his death, when the lady again became a widow.

ASHTON  
v.  
M'DOUGALL.

Within three months after the death of Birch, viz., on the 18th of June, 1831, she married the plaintiff; and if she had practised any fraud upon him by misrepresentations respecting the property, or given reason to suppose that he would become entitled to it in her right, or, if a single woman, entitled to property limited to her sole use free from the control of any husband she might marry ought to be deemed, by the act of marriage, to have conferred such property on her husband, Mr. Ashton might have been entitled to relief: but the case is entirely different; Mr. Ashton, before his marriage, was perfectly well acquainted with the settlement. He married his wife, knowing that her property was limited to her separate use, and for some years after the marriage he entirely acquiesced in it. Under the circumstances, \*I am of opinion, that the plaintiff is not, in right of his wife, entitled to any part of the property which he claims, and that the whole foundation on which he asks for relief entirely fails.

[ \*67

It was argued that the plaintiff, if not entitled to more, was at least entitled to such part of the income as became due between the death of Birch and Mrs. Ashton's marriage with the plaintiff: but I am of opinion, that any sums to which she was entitled when she married, were due to the trustees for her benefit, and were subject to the trusts, and payable to her for her separate use.

As the plaintiff appears to me to have no interest in the property comprised in the settlement, I can give no relief in respect of the breaches of trust which have been committed; and the bill must be dismissed with costs against all the defendants.

### THOMASON v. MOSES.

(5 Beav. 77—82; S. C. 6 Jur. 403.)

1842.  
April 18, 22.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 77 ]

A testator (passing over his heir-at-law, the son of his deceased eldest brother) gave 1,000*l.* to the testator's father for life, and after his death to be continued to the testator's younger brother, and proceeded thus: "and after his death to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family": Held, that the ultimate limitation was void for uncertainty.

In a suit to obtain the decision of the Court on a very doubtful will, the plaintiff turned out to have no interest. The Court, upon making a declaration of the rights, ordered the costs of all parties out of the fund.

THE question arose on a bequest contained in the will of the testator Thomas Moses, which was as follows: "There is 1,000*l.* sterling,

THOMASON  
v.  
MOSES.

lodged in the hands of Messrs. Ease and Bond, merchants, London, I wish my attornies at home to receive it as soon after my decease as possible. I wish it to be put out on interest in England, and secured on landed property, the interest thereof to be received by my father during his natural life, and after his death to be continued to my brother Henry Moses during his natural life, and after his death, to be continued to my next nearest heir, and so on. This property is not meant to be disposed of by any of the family."

The testator died in 1813, leaving his father and the issue of his deceased eldest brother Richard, and two other brothers, Henry and John, him surviving.

At the time of his death, Richard, the son of Richard, the deceased eldest brother, was the testator's heir-at-law, and John Moses, the testator's father, was his sole next of kin.

John Moses, the father, died in 1822, and Henry Moses, the brother, died in 1832, having respectively received the interest of the 1,000*l.* to their deaths. At the death of Henry, Richard, the son of Richard, was the heir-at-law of the testator, and the children of Richard, Henry, and John were his next of kin. The question was, to whom, under the circumstances, the 1,000*l.* now belonged.

[ 78 ]

There were several claims advanced for this fund.

First, it was claimed by Richard the younger, the heir-at-law of the testator, on the ground of the money being given to the heir as a *persona designata*: *Gwynne v. Muddock* (1).

Secondly, it was claimed by the daughters of Henry, the testator's second brother, as co-heirs, on the ground of their being the "next and nearest heir" to Henry, their father, it being argued on their behalf that the testator had passed over Richard and his issue; that the bequest could not revert back to that line so as to continue to "the next and nearest heir;" and that the word heir did not always mean the heir-at-law strictly, but might be qualified: *Chambers v. Taylor* (2).

Thirdly, it was claimed by the persons who were the next of kin of the testator at the death of Henry, on the ground that the word "heir," having reference to personalty, must be construed next of kin: *Holloway v. Holloway* (3), *Vaux v. Henderson* (4), *Gittings v. M'Dermott* (5); and that the class must be ascertained at the death of Henry, the tenant for life: *Mounsey v. Blamire* (6).

(1) 9 R. R. 327 (14 Ves. 488).

(2) 45 R. R. 94 (2 My. & Cr. 376).

(3) 5 R. R. 81 (5 Ves. 399).

(4) 21 R. R. 193 (1 Jac. & W. 388, n.).

(5) 39 R. R. 139 (2 My. & K. 69).

(6) 28 R. R. 133 (4 Russ. 384).

Fourthly, it was claimed by persons representing John, the father of the testator, on the ground that he was sole next of kin at the testator's death, and who insisted that the gift was void for uncertainty, and went to the father as next of kin: *Waite v. Templer* (1).

THOMASON  
v.  
MOSES.

*Mr. Pemberton and Mr. Rolt, for the plaintiff.*

[ 79 ]

*Mr. Kindersley and Mr. K. Parker,*

*Mr. G. Turner and Mr. Rogers,*

*Mr. Walker, for other parties.*

*Mr. Pemberton, in reply, referred to Lord Deerhurst v. The Duke of St. Alban's* (2).

#### THE MASTER OF THE ROLLS :

The question in this cause depends on the construction of the words "to be continued to my next nearest heir, and so on." The testator, at the time of his death, had a father and two brothers, Henry and John, who were living, but his eldest brother Richard had previously died, leaving children. In this situation of things he made his will, containing this expression of his wishes; without any doubt he intended a perpetuity. The heir of the testator, at the time of his death, being the eldest son of Richard, he adopted this particular mode of succession; he gave it first to his father for life, then to his younger brother for life, and then "to be continued to his next nearest heir." These words seem relative, and refer to what went before, and he seems to have intended the persons next to those whom he had treated as heirs by the preceding gifts. The difficulty is this, did he mean the heir properly so called, or some other persons? And I have considerable difficulty in imputing to him that he meant the person who, as heir-at-law, would have succeeded to his real estate.

The first gift is to the father, who was not his heir, and the next gift is to the younger brother, who was \*not heir, and then it is to be continued to his next nearest heir; next to whom? It is contended, that it must have been the next heir, excluding all those passed over. On the other hand, it is said he meant it to go to all his brothers, and then to revert back to the child of the deceased brother.

[ \*80 ]

(1) 29 R. R. 161 (2 Sim. 524).

(2) 37 R. R. 260 (2 Cl. & Fin. 611).



THOMASON  
v.  
MOSES.

There is so much difficulty and uncertainty, that I think it impossible to give the words a satisfactory construction. If that should be the case, the gift will be void, and belong to the next of kin. I will give the point further consideration.

April 22.

THE MASTER OF THE ROLLS:

Having further considered this case, I remain of the opinion which I before expressed. The testator, intending the legacy of 1,000*l.* to be continued in his family, seems to have contemplated a peculiar line of succession in which he meant the legacy to devolve.

His father was to take first.

After the death of his father, his brother Henry, who was his eldest surviving brother, was to take.

After the death of Henry, the legacy was to be continued to the testator's "next nearest heir, and so on."

The words "continued to my next nearest heir, and so on," appear to me to have relation to the preceding limitations. They seem to mean a continuation to the testator's nearest heir, in some way next after him who has before enjoyed the legacy, and so on in like order of succession.

[ 81 ]

What then is the succession, which, beginning with the father, and after the father's death passing over the heir, and children of the testator's eldest brother, vests in the eldest surviving brother, and is then to be continued in like succession to the testator's next nearest heir?

I think it quite uncertain who was meant to be designated by the word "heir."

In the ordinary sense of the word, the father was not the testator's nearest heir; nor was the eldest surviving son nearest heir, or heir next after the father. How then are we to determine, from the words, who is the next nearest heir, in a succession, which, having thus commenced, was to be continued "so on"?

The testator may have contemplated a line of succession, capable of being, within proper limits, carried into effect by apt words: but the word "heir," which he has used, imports, in some sense or other, the right of legal succession; and he has at the same time so expressed himself, as to show that he did not intend the order of legal succession; and under these circumstances, it appears to me, that the persons intended to take after Henry are wholly uncertain, and that the legacy belongs to the next of kin under the statute.

*Mr. Turner :*

THOMASON  
v.  
MOSES.

The plaintiff has therefore no interest, and the bill must be dismissed.

THE MASTER OF THE ROLLS :

This is a proper case for payment of the costs of all parties out of the fund. There was once a doubt whether \*costs could be ordered to be paid in such a case, but it has been held otherwise. There must necessarily be a declaration of the rights.

[ \*82 ]

*Mr. Turner* said, he remembered a case, in which Lord ELDON said that he would make no decree, unless the parties would consent that the costs should be paid according to the equity of the case.

### EVANS v. BROWN (1).

(5 Beav. 114—123; S. C. 11 L. J. Ch. 349; 6 Jur. 380.)

A testator died without heirs, seised of freeholds which he had not charged with his debts: Held, that as against the lord claiming by escheat, they were assets for the payment of the testator's debts under 3 & 4 Will. IV. c. 104.

The subsequent words of the statute conferring remedies upon creditors as against the heir or devisee of the deceased do not limit the application of the statute to land which has not escheated.

1842.  
May 3, 6.  
Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 114 ]

THOMAS LLEWELLYN PARRY, by his will dated the 16th of June, 1834, after devising an estate in Cardigan to Thomas Parry Thomas, gave all his other real estates in Cardigan, Carmarthen, or elsewhere to Judith Parry for life, with remainder to trustees to preserve contingent remainders, with remainder to the sons of Judith Parry in tail male, with remainder to the daughters of Judith Parry as tenants in common in tail, with remainder to the right heirs of the testator.

The testator died on the 13th of November, 1836. He left no heir-at-law, and a creditor's suit having been instituted, and the usual accounts having been taken, under a decree dated the 4th of August, 1837, it appeared by the report of the 10th of June, 1839, that the personal estate was insufficient for payment of the testator's debts, and that the testator died seised of several estates in the counties of Cardigan and Carmarthen, other than the estate devised to Thomas Parry Thomas.

The *Attorney-General* was a defendant to the cause, and when it

(1) *In re Hyatt* (1888) 38 Ch. D. 609.

EVANS  
v.  
BROWN.

came on to be heard for further directions, on the 10th of July, 1839, the will was established, and it was declared, that the reversion of the testator's real estates by his will expressed to be devised to his own right heirs, was the primary fund applicable, in aid of his personal estate, in payment of his debts; and liberty was given to the plaintiffs to make such application to the Crown as they should be advised, relating to such reversion.

[ 115 ]

According to the leave thus given, a memorial was presented to the Lords of the Treasury, stating the reversion had escheated and devolved to her Majesty, and praying a grant thereof, to the end that the same might be sold, and the proceeds applied, in aid of the testator's personal estate, in satisfaction of his debts.

In consequence of this memorial, and under a warrant duly issued, an inquisition was taken on the 7th of August, 1839, and thereupon it was found, that the testator was, at the time of his death, seised in fee simple of, or otherwise well entitled to, the several estates therein mentioned and described, and that the reversion thereof in fee, expectant on the death without issue of Judith Parry, devolved unto his late Majesty, and had since descended and then belonged to her present Majesty in right of her Crown, and had been seised into the hands of the Crown.

The Crown afterwards, in January, 1840, granted the reversion to the four first named defendants in this cause, on trust to sell the same, as this Court should direct, and stand possessed of the purchase-money, on trust to pay certain costs and expenses, and then in trust to apply the monies to arise from the sale, in such manner as this Court should direct, in aid of the testator's personal estate, for payment of his debts, in the same manner as if the reversion had not escheated.

This bill was filed for the purpose of having the trusts of that grant carried into execution; and it was alleged, that the suit had become necessary, in consequence of the defendant Edward Hamlyn Adams claiming to be entitled to the reversion of such of the estates in question as were situate in the county of Cardigan, as the lord of certain manors, under which the estates were held; \*and the bill charged, that Mr. Adams sometimes alleged, that the reversion of these estates had escheated to him discharged of the testator's debts, and sometimes alleged, that the testator's personal estate was not insufficient for the payment of his debts.

[ \*116 ]

The defendant Adams, by his answer, stated that on the 18th of December, 1829, the two manors of Gwynioneth Iskardin, and

Caerwedros were granted to him in fee by the Crown; that part of the real estates of the testator were held of the said respective manors, and that certain mortuaries and chief rents were payable to him as lord of the said manors; that the mortuaries and some arrears of chief rents were due to him, and he submitted that the same ought to be paid to him, out of the sums received and paid into Court by the receiver. He then submitted, that he, as lord of the two manors, was entitled to the reversion in fee expectant on the death without issue of Judith Parry, of and in such parts of the aforesaid hereditaments mentioned to be devised to her, as were held of the said respective manors. He insisted, that the reversion now vested in him, was not applicable, at all, to the payment of the testator's debts, and that if the same were so applicable, it was only so, in case the devised estates of the said testator and the other reversions granted by the Crown in trust for the creditors, should be found insufficient. And, finally the defendant, Mr. Adams, insisted that the plaintiffs had no equity against him.

EVANS  
v.  
BROWN.

The parties admitted that the plaintiffs were creditors of the testator, and that the defendant Adams was grantee from the Crown of the two manors of Gwynioneth Iskerdin, and Caerwedros; but it did not appear to be ascertained or admitted, which of the lands devised to Judith Parry for life, were comprised in those two manors.

\* \* \* \* \*

*Mr. G. Turner and Mr. Pitman*, for the plaintiffs in the supplemental suit, who were creditors of the testator. [ 117 ]

*Mr. Tinney and Mr. W. Hislop Clarke*, for the plaintiffs in the original suit.

*Mr. Spence and Mr. Wood*, for the infant T. P. Thomas.

*Mr. K. Parker and Mr. Bevir*, for R. L. Lloyd and J. Parry.

*Mr. Pemberton and Mr. Bates*, for E. H. Adams:

\* \* The 3 & 4 Will. IV. c. 104, does not apply to the superior lord, but only to the heirs and devisees of parties dying indebted. \* \* \* [ 118 ]

Again, if the reversion is subject to the debts, still it is not to be applied in priority of the other devised estates, and the other reversions granted by the Crown.

EVANS  
v.  
BROWN.

The defendant Adams has improperly been made a party to the suit, which is to have the trusts of the grant from the Crown carried into execution, and with which he has no concern.

*Mr. Wray, for the Attorney-General :*

The rights of the Crown in this case has been used merely as an instrument to assist the creditors of the testator ; if the finding of the inquisition be wrong, the proper course would be to sue out a *scire facias*, and traverse the inquisition. The question cannot be decided as between co-defendants.

*Mr. G. Turner, in reply. \* \* \**

May 6.

THE MASTER OF THE ROLLS :

[ 119 ]

Mr. Adams, having been no party to the original cause, is not bound by any of the proceedings therein, either by the Master's finding, from which it appears that the personal estate was insufficient to pay the testator's debts, or by the declaration that the reversion of the estates devised to the testator's right heirs was the primary fund for the payment of his debts. He claims to be entitled to the reversion of such only of the testator's lands, as are held of the two manors which were granted to him. The reversion of other lands he does not claim.

The principal question in this cause is, whether lands of which a testator dies seised, without having charged them with his debts, are assets for the payment of his debts, in the case of his dying without an heir.

[ \*120 ]

The statute of the 3 & 4 Will. IV. c. 104, expressly declares, that when any person shall die seised of or entitled to any land, which he shall not have charged with the payment of his debts, the same shall be assets, to be administered in courts of equity, for the payment of the just debts of such person. This part of the enactment \*is, in itself, large enough to take in any case. Whether the real estate shall be assets, is, in this part of the clause, made to depend on the seisin or title of the debtor at the time of his death, and on his neglect to charge the estate with the payment of his debts. But the Act proceeds, in the same clause, to provide that the heir or devisee of the debtor shall be liable to all such suits by creditors, as the heir or devisee of any persons dying seised of land was previously liable to, in respect of such land, at the suit of creditors by specialty, in which the heirs were bound. And it is argued, that this notice

EVANS  
v.  
BROWN.

of a remedy against the heir and devisee is to be taken as an indication, that the preceding enactment ought to be limited, and that instead of reading the words generally, as they stand, "the same shall be assets," we ought, in effect, to read them as if they stood thus, "the same, as against the heir and devisee respectively, shall be assets to be administered," &c.

It has been held, that by the statute of the 3 & 4 W. & M. c. 14 (by which it was provided, that devises should be void as against creditors, and that the remedy of a creditor should be by action of debt against the heir and devisee jointly), no remedy was given in the case of a debtor by specialty dying without an heir (1). So that there being a devisee and no heir, the creditor had no remedy under the statute of W. & M. That defect was supplied by the statute 11 Geo. IV. & 1 Will. IV. c. 47, which gave the remedy against the devisee only.

In the present case there was an intended devise to the heir; but there being no heir the devise failed, and the question is, as to the right of the creditors in the absence of both heir and devisee. The lord of the manor claims to be entitled by escheat, and the creditors claim to be paid, under a statute which expressly enacts that the \*real estate shall be assets to be administered in courts of equity for the payment of the debts of the person who died seised, and only refers to a remedy against the heir or devisee.

[ \*121 ]

Under the statutes this Court has held the estates to be assets in the hands of the heir or devisee to pay specialty debts. The statute 47 Geo. III. c. 74, makes assets for the payment of simple contract debts, the estates which before were assets for the payment of debts due on specialty in which the heirs were bound. The statute of the 3 & 4 Will. IV. makes all the estates of which the testator died seised assets for the payment of just debts, as well debts due on simple contract as on specialty.

As the testator had not charged the estate as he might have done with payment of his debts, the Act came into operation immediately upon his death, and by the Act the estate is to be assets for the payment of debts. The words seem sufficient to annex the quality of assets to the estate itself; and it would seem that whoever succeeds to the estate, and in whatever right, must take it with that quality. I own that the case seems to be very different from that which arose in *Hunting v. Sheldrake* (2) under the Act of the 3 & 4 W. & M. By that Act the devise was made

(1) *Wilson v. Knubley*, 7 East, 128.

(2) 9 M. &amp; W. 236.

EVANS  
v.  
BROWN.

void as against the creditor, and the devisee having no title as against the creditor, the only right given to the creditor, who had previously none, was by action of debt against the heir and devisee. The creditor had no right whatever unless he could bring such action; and in this respect I conceive that, notwithstanding the suggestion in *Gawler v. Wade* (1), equity has followed the law. But it does not appear to me, that the right conferred by the Act now under consideration, is necessarily or properly limited by the subsequent \*part of the clause, which provides, that as against the heir and devisee, the same suits might be brought as before might be brought against them by a specialty creditor.

[ \*122 ]

The creditors have a legislative provision that the real estate shall be assets. The lord has his right to chief rents and other payments or services; but there is a tenant of the land, and his title by escheat cannot be complete. He has a prospect of becoming entitled by escheat, and in respect of that prospect claims to be interested in the reversion, and insisting on that claim, he also insists that the statute is not applicable against him, and that the reversion is not assets for the payment of debts. In whatever way the right of the lord may be conceived to arise, he must, I think, take his interest, whatever it may be, which accrues upon or after the death of the tenant, subject to the qualification which the Legislature has impressed upon the land, and I therefore cannot concur in the claim which he has set up to be wholly free.

But he says, that even if the reversion which he claims is subject to the payment of debts, it ought not to be applied till the devised estates and the reversion granted by the Crown have been found to be insufficient.

Considering the whole estate to be made assets, it certainly does not appear to me a necessary consequence, that the reversion now claimed by the lord ought to be deemed to be the primary fund for the payment of debts. The words of the statute may be satisfied without going that length; and Mr. Adams is not bound by the declaration made in the decree on further directions, which, being true in the case of real assets descended to the heir, and it being well known that the Crown desires to facilitate the payment of debts, seems to have \*been taken in this case without argument or opposition from the *Attorney-General*. I think that Mr. Adams has a right to have the question of priority independently considered; and, if it is desired, the case may be argued on that point.

[ \*123 ]

In the meantime, Mr. Adams may, if he pleases, have the account taken in his presence for the purpose of ascertaining that the personal estate is exhausted; and it must be referred to the Master, to inquire which of the estates devised to Judith Parry as in the will mentioned are held of the manors of Gwynioneth Iskerdin, and Caerwedros respectively, and also to take an account of what is due to Mr. Adams for mortuaries and chief rents or otherwise.

EVANS  
r.  
BROWN.

[NOTE.—In June, 1846, the real estate was sold under this judgment (see *Tyler v. Thomas*, 25 Beav. 47), from which it seems probable that an appeal which had been made from the judgment to the House of Lords was not prosecuted (see *In re Hyatt*, 38 Ch. D., at p. 620).—O. A. S.]

### GREET v. GREET.

(5 Beav. 123—129.)

1842.  
May 31.  
June 1.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 123 ]

Under the bequest of a residue to A. (who had no children) for life, and at his death 5,000*l.* to be deposited in the hands of trustees for the use of A.'s eldest son, on his attaining the age of thirty years; the rest to be equally shared, A.'s eldest son taking an equal share in addition to the 5,000*l.*, and the general division to take place as each respectively attains twenty-four. Held, that all these gifts vested at the death of A. and that they were not void for remoteness.

THE testator, by his will dated in 1825, after making certain dispositions, gave the rest and residue of his property, freehold and personal, as follows: "to the use of my nephew Thomas Young Greet at his attaining the age of thirty years, the produce of such parts of property as may be necessary to convert into cash, with every accumulation by rents, interest, or otherways, I direct to be deposited in the stock of the Bank of England, in the names of my nephew, Thomas Young Greet, and of each of my executors hereafter named, \*there to remain; my nephew Thomas Young Greet, at his attaining the age of thirty years, to receive, for his use, all accruing produce and dividends, rents or interest, so long as he may live; and that once in every year, the whole of the balances be funded for accumulation, until he, my said nephew Thomas Young Greet, does attain the age of thirty years, at which time every produce of the property, with dividends on the accumulated property, which I direct to be consolidated in one sum, with any other placed in the Bank of England at my death or

[ \*124 ]



GREET  
v.  
GREET.

afterwards, as a part produce of my property and to remain as a principal, the dividends of or on which, with all rents or other produce growing out of every description of my property, I give to my said nephew Thomas Young Greet, for his use and disposal during his natural life.

“ If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving child or children lawfully begotten, I direct each child, male or female, shall have 500*l.* at their respectively attaining the age of twenty-four years, and the surplus of any such property and its accumulations to go, in addition, to the eldest son of my nephew Thomas Young Greet ; but if the children of my said nephew are too numerous for the property to produce 500*l.* each, in such case, I shall direct they shall each have an equal share of the property, male and female alike.

[ \*125 ]

“ If my nephew Thomas Young Greet should live, and agreeable to the directions of this my will, possess this my described residue of my property with its accumulations, and have lawfully begotten a son, I direct my nephew to enjoy the produce of such property with its accumulations during his life, and at his death, 5,000*l.* to be deposited in the hands of trustees for accumulation, \*and placed in the Bank of England in the name of his my nephew's eldest son with two trustees (my executors preferred if surviving), for the use of my said nephew's eldest son at his attaining the age of thirty years ; and the rest and residue to be equally shared, male and female equal alike, the eldest son taking an equal share, in addition to the 5,000*l.* funded for him. This general division to take place as each respectively attains the age of twenty-four years.

“ If my nephew Thomas Young Greet should die previous to his attaining the age of thirty years, leaving no child, then I direct the next surviving nephew of Alexander Greet's family shall succeed to the residue and its accumulations, subject exactly to the same regulations as described for my nephew Thomas Young Greet and his family.”

The testator then appointed his nephew Thomas Young Greet and three other persons executors.

The testator died in 1829, leaving his nephew, Thomas Young Greet, then of the age of twenty-two. He married in 1832, and had four children, the eldest having been born in 1833.

Thomas Young Greet the nephew died in 1841, leaving his eldest son, Thomas Young Greet the younger, and three other children, surviving him.

The property was partly real and partly personal.

Thomas Young Greet the younger, after his father's death, filed a supplemental bill against all the necessary parties, claiming to be entitled, first, to the sum of \*5,000*l.*; and, secondly, to his share of the general residue of the property after the deduction of that sum.

GREET  
v.  
GREET.

[ \*126 ]

*Mr. Pemberton and Mr. Lewis* for the plaintiff :

\* \* In this case, the gift to the children was vested both as to the realty : *Doe d. Roake v. Nowell* (1), *Farmer v. Francis* (2), *Doe v. Ward* (3); and as to personalty : *Branstrom v. Wilkinson* (4), *Booth v. Booth* (5), *Saunders v. Vautier* (6), *Davis v. Fisher* (7).

The 5,000*l.* clearly vested at the death of the nephew, for it was then to be immediately severed and placed in the name of trustees for the plaintiff. The share of the residue, given "in addition" to the eldest son, is subject to the same conditions and incidents (8), and is also vested. The general division refers only to the payment to the several legatees. It is to be observed also, that this is a gift of residue, in which case the Court leans strongly towards a vesting; and the gift over is only in case of the death of the nephew leaving no child.

*Mr. G. Turner and Mr. Addis*, in the same interest.

[ 127 ]

*Mr. Kindersley and Mr. Wood*, for the next of kin and co-heirs :

The gift to the children of the nephew is too remote. The 5,000*l.* was given to the eldest son of the nephew, "at his attaining the age of thirty years:" he therefore took no interest until that period; and, consequently, the gift is void. [They cited *Leake v. Robinson* (9).] It is true, a separate trust was created of the 5,000*l.*; but to say that it is vested merely because a separate trust is created, is begging the question: the gift may be as much contingent when a trust is created as before.

*Saunders v. Vautier* was a specific gift, and was limited to the legatee, his executors, administrators, and assigns absolutely. They also cited *Cambridge v. Rous* (10) and *Duffield v. Duffield* (11).

(1) 14 R. R. 445 (1 M. & S. 327).

(7) *Post*, p. 468.

(2) 27 R. R. 570 (2 Bing. 151).

(8) See *Day v. Croft*, 55 R. R. 163

(3) 48 R. R. 599 (9 Ad. & El. 582).

(4 Beav. 561), and the cases there cited.

(4) 6 R. R. 146 (7 Ves. 421).

(9) 16 R. R. 168 (2 Mer. 363).

(5) 4 R. R. 235 (4 Ves. 399).

(10) 6 R. R. 199 (8 Ves. 12).

(6) 54 R. R. 286 (Cr. & Ph. 240).

(11) 32 R. R. 70 (3 Bligh, N. S. 260).

GREET  
v.  
GREET.

*Mr. Schomberg and Mr. Hingeston for other parties.*

*Mr. Pemberton, in reply.*

THE MASTER OF THE ROLLS:

[ \*128 ]

This is one of the many cases in which I am afraid it is impossible to come to a conclusion which can be considered as entirely satisfactory. You are obliged to \*spell out the meaning of the testator, and to try to discover the legal effect of his will, under circumstances which make it extremely difficult to reconcile the case under consideration with the decided authorities.

I think it is perfectly obvious, in this case, that the testator had a strong desire to accumulate the property as much as he could, and to preserve it in the family of the Greet. Those objects clearly preponderate throughout the whole contents of the will; but the main and the principal object in the residuary clause was, to provide for his nephew Thomas Young Greet and the children of that nephew; and there is no ulterior disposition given of the residue, except only, in the event of the nephew, Thomas Young Greet, dying under the age of thirty years without leaving a child.

At the death of the nephew, the 5,000*l.* is to be taken out of the residue, and deposited for accumulation in the hands of trustees, one of whom was to be the eldest son of the nephew. The accumulation is directed to be for the use of the nephew's eldest son, "at his attaining the age of thirty years." I think it comes to no more than this: The testator intended that the son should attain the age of thirty years before the accumulated fund should be paid to him, and not that in the meantime he was to have no interest in this sum.

[ \*129 ]

It appears to me that he had a vested interest in the sum of 5,000*l.*, at the moment the severance was to be made, namely, on the death of the nephew. After taking the 5,000*l.* out of the residue, the remainder is to be shared between the children, both male and female alike, the eldest son taking an equal share, in addition to the 5,000*l.* funded for him; and as the 5,000*l.* vests \*upon the death of the nephew, it would be extremely difficult to maintain that his share of the residue does not vest at the same time, or to say that the share of the residue could vest in him at that time, and not in the other children.

Is the Court forced to come to an opposite conclusion by the

words which afterwards follow, that this general division is to take place, as each respectively attains the age of twenty-four years? The testator could never have meant, that a general division should take place at different times. His object was, that there should be a general division of the whole fund, after previously severing the particular sum of 5,000*l.*; after deducting that sum, which was one division, there was to be the general division of the remainder; and, according to the intent, to be inferred from the rest of the will, I think this amounts merely to a direction, that the shares should be paid to the younger children as each attained twenty-four.

I am of opinion that both the 5,000*l.* and the share of the residue were vested interests, and the plaintiff must therefore succeed in this case.

GREET  
r.  
GREET.

### QUARMAN *v.* WILLIAMS.

(5 Beav. 133.)

Upon an application for a stop order, the assignor's right to the fund in Court must be shown, either by the proceedings or by affidavit.

A PARTY who claimed an interest in a fund in Court, in the character of next of kin, created an incumbrance thereon, and he and the incumbrancer now presented a petition for a stop order.

*Mr. Sheffield*, in support of the petition.

The MASTER OF THE ROLLS held that the petitioners must show by some proceeding in the cause, or by affidavit, that he sustained the character of next of kin, otherwise the Court might place a stop order on a fund, on the application of persons having no interest whatever in it.

It being admitted that this did not appear, the petition stood over to file an affidavit.

1842.  
June 7.  
Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 133 ]

### HARVEY *v.* HARVEY.

(5 Beav. 134—139; S. C. 4 Beav. 215—222.)

A testator gave 150*l.* a year to such of his relations as his widow should deem requiring and most meriting relief: Held, that a widow of the testator's brother was not an object, and the widow having given a portion to the brother's widow, and the remainder to the relations, held also, that a relative to whom no part had been appropriated, and who did

1842.  
June 8.  
Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 134 ]

HARVEY  
v.  
HARVEY.

not show himself to possess the qualification, had no right to question the misappropriation.

A testator gave his widow "the full and entire enjoyment" of his real and personal estates, which, after her death, he gave to other persons; and he empowered her to retain a portion of a sum of 150*l.* a year given to other parties, for renewing the leaseholds. Held, she was entitled to enjoy the leasehold in specie, that it was not imperative on her to renew, but that she had acted wrong in surrendering a lease, of which she was the only cestui que vie, as she thereby deprived herself of the option of renewing for the benefit of the parties in remainder.

[THE following statement of the will in this case is taken from 4 Beav. 215, where a question was reported as to the constitution of the suit, which it was not considered necessary to retain in the Revised Reports.]

1841.  
July 1, 5.  
[4 Beav. 215]

The testator, by his will dated in 1816, devised and bequeathed unto his wife "the full and entire enjoyment" of "his real and personal estate, subject to the payment by his said wife of the sum of 150*l.* of lawful money of Great Britain annually, to such of his relations as she should deem requiring and most meriting relief;" and he devised his real estates to trustees, after the death of his wife, "to the use of the eldest son that might then be living of James Harvey, his nephew, and the eldest son that should then be living of Edward Harvey his nephew, in equal proportions, share and share alike, during the terms of their natural lives; then, if the said eldest sons of the said James Harvey and Edward Harvey should become entitled by virtue of his said will to receive the rents and profits of his said freehold estates, during their minorities, it was his will that there should be paid to the said James Harvey" \*and Edward Harvey, respectively, the sum of 30*l.* annually toward the education and maintenance of such the said eldest sons respectively until they should respectively attain the age of twenty-one years, out of the rents and profits of his freehold estate, with remainder to the second, third, and other sons of James and Edward Harvey, in tail male; with remainder to their daughters; with remainder to the testator's right heirs. And he directed his trustees, immediately after his wife's death, to sell all his leasehold and chattel property, and invest the produce in the funds, "upon trust that they should apply the dividends and interest of the said securities, so as aforesaid to be purchased, unto, and equally amongst, all and every child and children, grandchild and grand-children, of the said James Harvey and Edward Harvey, who should not, from time to time, be in the receipt of the rent and

[\*216]

profits of his said freehold estates, devised as aforesaid ;” and in the event of failure of issue of the said James Harvey and Edward Harvey, the testator directed that the dividends and interest of the said securities should be equally divided between and amongst his own legal representatives.

HARVEY  
v.  
HARVEY.

By a codicil he declared it to be his will and meaning, that all his freehold leases in the different estates which he held under the see of Exeter, or otherwise, should be included in the same bequest, and be disposed of in like manner and for the same purposes, after the death of his said wife. And the said testator directed that all and every the child and children of his sisters Mary Arnold, Maria Odges, and Grace Hicks, deceased, and of Catherine Pearson, then alive, which should or might be living at the time of the death of his said wife, should take his and their share and shares of his property, directed to be sold by his trustees as aforesaid, in common with the representatives of James and \*Edward Harvey, provided for by his said will. And, lastly, the testator further declared his desire that his said wife Jane Harvey, *alias* Jenefer Harvey, should be empowered to retain in her hands all or any parts of the annual sum of 150*l.*, given by his said will to his different relatives, and to be paid them as therein mentioned, and by such means to create a fund to be applied for the renewals of a life or lives, in all or any of his freehold leases or leases for lives, determinable on terms of years. And the testator expressed it to be his desire that in so doing his said wife should consult with and take the advice of his said trustees.

[ \*217 ]

After the testator's death his wife proved his will.

The plaintiff, one of the children of James Harvey, filed this bill “on behalf of herself and all others entitled as residuary legatees in remainder,” against the widow, the surviving trustees, the heir-at-law, and Catherine Pearson.

The bill alleged, that the persons now forming the class in the said will named, as children and grandchildren of James Harvey, and Edward Harvey, and the children of Catherine Pearson, were exceedingly numerous, being upwards of twenty-six, at least, in number. That there were several children of Mary Arnold, Maria Odges, and Grace Hicks in the said will named ; and who were alleged by the defendant, the widow, to have, as next of kin of the said testator, an interest, conflicting with that of the plaintiff and the other legatees.

The bill prayed the establishment of the will : the necessary

HARVEY  
 v.  
 HARVEY.  
 [ \*218 ]

accounts of the estate: the renewal of the leases out of the surplus of the 150*l.* a year: that the executrix might be made answerable for the leaseholds \*which had not been renewed, and that the 150*l.* might be duly administered under the direction of the Court.

[5 Beav. 134] On that occasion the Master was directed to ascertain the next of kin of the testator living at his death, and the representatives of those who had since died.

The Master reported that such next of kin were twenty in number, of whom twelve were now living, and that of the remaining eight, there were personal representatives to three only, and that the others were not represented.

[ \*135 ] The persons, parties to the cause, who would be entitled to the residue, in case of the gift being too remote and void, were the widow, who would be entitled to one third, Catherine Pearson, a sister of the testator, entitled to one sixth of the remainder, or two eightieths, and Thomas Harvey, the representative of the testator's \*brother Thomas, entitled also to two eightieths; so that, on the whole, five ninths of the next of kin were represented in the suit.

The cause again came before the Court.

The Court having determined that it would hear the cause in the absence of the other next of kin, the questions were, first, whether the gift of the personalty in trust to pay the dividends "from time to time," to the children and grandchildren of James and Edward was or was not too remote.

Secondly, whether the testator's widow had exceeded her discretion, in giving to the widow of the testator's brother Thomas a portion of the 150*l.* directed to be distributed amongst the testator's "relations"; and if not, then whether the plaintiff had any interest in the sums misapplied, he not having proved himself as coming within the qualification.

Thirdly, whether the widow had acted wrong in surrendering the lease of which she was the surviving cestui que vie.

*Mr. Pemberton and Mr. W. M. James*, for the plaintiff:

The distribution of the personal estate is to be amongst a class to be ascertained at the death of the widow, and the gift is not therefore too remote. The bequest of the dividends, though payable "from time to time," carries the capital (1). The codicil, which directs other persons living at the death of his wife, should take "their share of his property," removes all doubt.

(1) See *Page v. Leapingwell*, 11 R. R. 234 (18 Ves. 463).

The widow was not empowered to give any portion of the 150*l.* a year to the widows of the testator's relations; and she had no right to surrender the lease which the testator intended to be renewed.

HARVEY  
HARVEY.  
[ 136 ]

They asked the usual accounts and inquiries as to the leaseholds and the 150*l.* a year, with liberty to state special circumstances.

*Mr. Turner and Mr. John Baily, contra :*

The division is to be from time to time between parties, who must be ascertained *de anno in annum*, and may not necessarily be born within the limited period: the gift is therefore void for remoteness. [*Lord Southampton v. Marquis of Hertford* (1), *Lord Deerhurst v. The Duke of St. Albans* (2) were cited.]

*Mr. Kindersley, Mr. Rogers, and Mr. Chandless*, for other parties.

*Mr. Pemberton*, in reply.

#### THE MASTER OF THE ROLLS :

The question in this case is whether the plaintiff is entitled to the relief he asks. It must be owned that the words "from time to time" occasion considerable ambiguity, and it is very difficult to give effect to them, in any way consistent with the other expressions in this will. I think, however, that the words are intended to describe a class of persons existing at the death of the tenant for life, and not a class to take in succession. Such would plainly be the construction, unless we are to give the words "from time to time" an effect \*which should control the meaning of all the other words. I do not think that ought to be done, especially having regard to the words contained in the codicil. I apprehend the meaning of the words is this, there is a direction "to apply the dividends and interest" (and that is quite unlimited) "unto and equally amongst all and every the child and children, grandchild and grandchildren of James Harvey and Edward Harvey" (so far it would be quite free from ambiguity) "who may not, from time to time, be in the receipt of the rents and profits of my freehold estates." Now, if the words had been simply "who might not be in the receipt of the rents and profits of my freehold estates," it would be quite clear.

[ \*137 ]

The person who might, "from time to time," be in the receipt of

(1) 13 R. R. 18 (2 V. & B. 34).

(2) 37 R. R. 260 (5 Madd. 232).



HARVEY  
 v.  
 HARVEY.

the rents and profits, anterior to the times of division, might depend upon a variety of events taking place. There might be two sons living. There might be one son and a grandson living. There might be one son of one son and several grandchildren of another son, and, in fact, a succession of rights might take place anterior to the times of division.

The words, as it seems to me, are nearly inconsistent with each other; and I am obliged to decide whether the words contained in the codicil are to preponderate. The result I have come to is, that the words which imply the existence of and division amongst a class at the widow's death, preponderate over the effect that ought to be given to the words "from time to time." I think therefore that the plaintiff has an interest in the property.

[ \*138 ] With respect to the next point, I am inclined to think that the plaintiff has no right at all to complain. There \*was a sum of 150*l.* given by the will, to be paid by the widow to such of the testator's relations "as she should deem requiring, and most meriting, relief." She was bound to apply that sum for the benefit of relations, and I think that the widows of relations are not persons who are comprised in that description; if therefore, it were necessary for me to decide that question, I think that there was an erroneous application. Who, then, would be the persons who are prejudiced by that application? Those relations who ought to have that sum applied for them. Has the plaintiff an interest in that? I am very much inclined to think he has not.

By the codicil, the widow was empowered to reserve a portion of this sum of 150*l.* for the renewal of the leasehold, but it was entirely optional, as it seems to me, on her part. If she had once set apart a sum of money for that purpose, the plaintiff, as being one of the persons entitled in remainder, would immediately have acquired an interest in it. She never did so, but made an erroneous application to the prejudice of other persons. I am inclined to think that the plaintiff is not entitled to call for an account in that respect; and if he were, I think that, after the length of time which he has permitted to elapse (six or eight years), it would be rather too much to say he should have any claim whatever. I think therefore that the plaintiff is not entitled to relief in that respect.

As to the leasehold surrendered, the widow was tenant for life, with a full right to enjoy the leasehold. The testator says, I give and devise to my wife "the full and entire enjoyment." As she was the cestui que vie, she became entitled to the whole beneficial

interest (1) ; and \*so far, the legal and beneficial interest were conjoined in her. Though I cannot think it of much importance, yet I do not approve of such a sale ; for I think she ought not to have deprived herself of the option, which the testator gave her, of retaining a sum for renewing these leases. I do not think a person in that situation had a right to deprive herself of the means of preserving the estate to the trust. She had the sole right of enjoyment ; the legal estate was vested in her, with an object pointed out to her, and giving her an option of retaining a fund, not given to her, but to the testator's relations, for the purpose of continuing that estate in the family. I cannot therefore think that her conduct was right. Supposing, however, that it was set aside, and that the 120*l.* was set apart as a portion of the trust fund, would she not be entitled to set off the rents of that estate against it, although she had parted with it ? I think she would, and therefore no benefit can come to the plaintiff from any investigation of the matter.

I am disposed to declare (as far as it can be declared in the absence of the other parties interested, and who are not to be prejudiced by what passes now), that the plaintiff, as one of the persons described in the will, has an interest in remainder after the death of the tenant for life. I can make no other decree unless the plaintiff desires an account.

HARVEY  
HARVEY.  
[ \*139 ]

### M'DERMOTT *v.* WALLACE.

(5 Beav. 142 ; S. C. 6 Jur. 547.)

1842.  
June 11.

A testatrix gave unto A. and B. a sum in the Long Annuities, to be equally divided during their lives, after which she gave the said sum to C. :  
Held, that the survivor of A. and B. took for life.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

THE testatrix by her will gave and bequeathed "all she possessed from the Long Annuities unto the persons thereafter named (that is to say), she gave to Mary and Elizabeth Grant of Chelsea the annual sum of 12*l.* to be equally divided during their lives, after which she gave the said sum to Elizabeth French M'Dermott."

Elizabeth Grant died in 1831, and Mary Grant died in 1841, and the question was who was entitled to the dividends on the Long Annuities between 1831 and 1841.

(1) *Pickering v. Pickering*, 48 R. R. *Tremamondo*, 50 R. R. 262 (2 Beav. 104 (4 M<sub>y.</sub> & Cr. 289) ; *Goodenough v.* 512).

[ 142 ]

M'DERMOTT  
v.  
WALLACE.

*Mr. Willcock*, for the representatives of Elizabeth French M'Dermott, contended that the gift to Mary Grant and Elizabeth Grant was for their joint lives only, and that immediately on the death of Elizabeth the Long Annuities went over to Mrs. M'Dermott.

*Mr. Stinton*, *contrà*, for the representatives of Mary Grant, argued that the words "after which" meant after the lives of both, and that Mary was entitled for her life by survivorship.

*Mr. Willcock*, in reply :

The words "after which" refer to some period previously referred to, and the only one is the joint lives.

THE MASTER OF THE ROLLS :

The question is doubtful ; but, on the whole, I think the gift over does not take effect till after the death of Mary.

1842.  
July 13.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 147 ]

## CURTIS v. LUKIN.

(5 Beav. 147—157 ; S. C. 11 L. J. Ch. 380 ; 6 Jur. 721.)

A gift is too remote, unless, according to the intention of the testator, some person must necessarily be in existence, with legal power to dispose of the property, within the period limited by the rules of law.

A gift must not only vest within the time limited by the rule against perpetuities, but the interests of the respective parties in the property must be capable of ascertainment within that period, otherwise the gift will be void.

A testator bequeathed leaseholds in Church Street, having sixty years unexpired, and as to which there was no obligation on the part of the lessor to renew, to A. for life, with remainder to the children she should leave, and in default to B. He bequeathed to trustees other leaseholds, upon trust to accumulate the rents, until the leases of the Church Street property "should become nearly expired," and then to apply such part thereof as should be necessary in the renewal of the Church Street property, "for the benefit of the respective persons to whom he had before, by his will, given the same ;" and the residue, after answering the purpose aforesaid, he gave to his residuary legatees. The testator died before the Thellusson Act came into operation. Held, that the trust for accumulation and renewal was void for remoteness and uncertainty.

THE questions in this cause were, first, whether the trustees and executors of the will of the testator, Mr. Shadrach Venden, had committed a breach of trust, by \*not investing the rents of three leasehold houses in Oxford Street and Audley Street, so as to

CURTIS  
v.  
LUKIN.

accumulate and form a fund for the renewal of the leases of two houses in Church Street, which had been bequeathed for the benefit of his niece, the defendant, Mrs. Curtis and her children; and secondly, whether the plaintiff, who was one of the children, was now entitled to call for the performance of this trust, or to charge the representatives of the executors of Shadrach Venden with the breach of trust.

The testator was possessed of two leasehold houses in Church Street for a term, of which between sixty and seventy years were unexpired, and he possessed three other leasehold premises in Oxford Street and Audley Street.

By his will, dated in 1794, he bequeathed the two houses in Church Street to four trustees, upon trust for the defendant Elizabeth Curtis (then Elizabeth Cheverell) for life, for her separate use, and from and after her decease, upon trusts which were expressed as follows: "to the use and benefit of any child or children my said niece Elizabeth Cheverell may leave by any husband or husbands she may happen to marry, equally to be divided amongst them, if more than one, share and share alike, and if but one child, the whole to such one child; but in case my said niece Elizabeth Cheverell shall not, at her decease, leave any child or children, then to the use of my nephew Shadrach Venden Cheverell."

The testator then bequeathed to his trustees the three leasehold houses in Oxford Street and Audley Street, upon trusts which he declared as follows: "upon trust, that they my said trustees shall and do, from time to time, receive the rents, issues, and profits of the above \*three leasehold messuages or dwelling houses situate in Oxford Street and Audley Street aforesaid, and lay out the same at interest till my several leasehold messuages or tenements herein-before mentioned, situate and being in Church Street aforesaid shall become nearly expired, and then, to pay and apply such part thereof as shall be necessary, in the renewal of my several leasehold messuages or tenements situate and being in Church Street aforesaid, for the benefit of the respective persons to whom I have before, by this my will, given the same." And he gave the money arising from the rents of his houses in Oxford Street and Audley Street, and the interest arising therefrom after answering the several purposes aforesaid, between Edward Venden, Shadrach Venden Cheverell, and Elizabeth Cheverell, and he also gave his residuary estate to the three last-mentioned persons.

[ \*149 ]

CURTIS  
v.  
LUKIN.

The testator died in 1795, so that the Thellusson Act (1) was inapplicable to this case.

After the testator's death, the trustees and executors, for some time, continued to accumulate the rents of the Oxford Street and Audley Street property. The leases expired in 1817, and it was stated, that the accumulated fund was afterwards divided amongst the residuary legatees.

[ \*150 ]

Mrs. Curtis, the tenant for life, was still living, and this bill was filed by one of her children, seeking a declaration, that the rents of the Oxford Street and Audley Street property ought to have been accumulated for the purpose of renewing the leases of the Church Street property; that the trustees and their representatives \*might be held responsible for the breach of trust, in not doing so, and that the money recovered might be applied in the renewal of the leases of the Church Street property.

The defendants, the representatives of the trustees, insisted, first, that the trust was void for uncertainty; 2ndly, that the period during which the accumulation had been directed might possibly exceed the limits allowed by law, and was therefore void.

*Mr. Kindersley and Mr. Younge, for the plaintiff:*

The trust for accumulation is valid, for the whole interest must necessarily vest in Mrs. Curtis's children and the residuary legatees within the period limited, viz., within a life in being and twenty-one years after. Immediately on the death of Mrs. Curtis every contingency will end, and her children and the residuary legatee will then have the power of disposing of the accumulated fund, and of stopping the further accumulation. This is all that is required by the rule which prescribes only the time within which the property must vest. Where there is a gift which vests within the limited period, but which is not payable until afterwards, the gift is not void, but the Court directs payment immediately on the legatee attaining twenty-one: *Saunders v. Vautier* (2).

Again, Mrs. Curtis may survive the leases, and then there could be no objection to the trust for renewal.

[ \*151 ]

The plaintiff, therefore, has a right to have the rents accumulated until the death of his mother; and the \*trustees having neglected to do so, are answerable for their breach of trust.

*Mr. Baily, for the widow and the other children.*

(1) 39 & 40 Geo. III. c. 98.

(2) 54 R. B. 286 (Cr. & Ph. 240).

*Mr. Pemberton, Mr. Hodgson, and Mr. D. James, for the representatives of the surviving trustees :*

CURTIS  
v.  
LUKIN.

The trust for accumulation and renewal is void, both for uncertainty and for remoteness.

\* \* \* \* \*

The plaintiff will only be entitled in the event of his surviving the tenant for life, and it will be impossible, even then, for the Court to say, what sum he is interested in ; for, until the expiration of the lease the amount necessary to obtain a renewal cannot be ascertained.

But assuming there is no vagueness or uncertainty in the trust, yet, it is void in consequence of its violating the rule of law against perpetuities. \* \* \*

It is said, that the children and the residuary legatees have the power of putting an end to the trust within the time, but that would be effected by agreement between themselves, and by defeating the testator's intentions and not by right. They have no power adversely to compel the other parties to compromise their rights, or to make valid by agreement, that which the law says is invalid. Again, what is to be the effect if one refuses to concur?—the accumulations must go on until the year 1863, and all the evils which the rule of law is intended to prevent must necessarily happen.

[ 152 ]

The intention was to accumulate for sixty-three years certain, which is void, and the Court cannot look to the \*events which have happened or may happen, in order to render valid a gift which is not so limited as to be beyond the possibility of being too remote. They cited *Leake v. Robinson* (1), *Proctor v. Bishop of Bath and Wells* (2), *Lade v. Holford* (3), *Ibbetson v. Ibbetson* (4).

[ \*153 ]

*Mr. Tinney, Mr. Bacon, Mr. G. Turner, Mr. Beales, Mr. Spence, Mr. Renshaw, and Mr. F. J. Hall, for other parties.*

*Mr. Kindersley, in reply :*

There are many cases in which there has been a direction to renew generally, and which have never been held void for uncertainty. To renew leases means on the same terms : *Price v. Assheton* (5). If it be held that this direction to renew is void for uncertainty, then every trust for the renewal of what is called renewable leases, which

(1) 16 R. R. 168 (2 Mer. 363).

(4) 51 R. R. 304 (10 Sim. 495).

(2) 2 H. Bl. 358.

(5) 41 R. R. 222 (1 Y. & C. Ex. Eq.

(3) W. Bl. 428.

82).

CURTIS  
v.  
LUKIN.

the landlord is not bound to renew, will also be void, as in the case of Bishops' and College leases.

THE MASTER OF THE ROLLS :

It is contended, that under this trust for renewal, the trustees were to receive the rents of the houses in Oxford Street and Audley Street, and accumulate them, until the leases of the other two houses had become nearly expired, that is nearly to the year 1863, when the last of these leases would expire or be upon the point of expiring, and then procure the best renewal of the leases they could.

[ 154 ]

To this it is objected, that it is carrying on an accumulation of rent and income beyond the period which the law allows, for it is not limited to a life in being and twenty-one years afterwards, but may continue very much longer ; this indeed is perfectly evident. The reply given to this objection is to this effect : it is very true, that if the trust be literally followed, it would be too remote, but it ought not to be literally followed, because, within the period allowed for accumulation, there must be persons ascertained, who alone would be entitled to this fund and every part of it : again, it is possible that Mrs. Curtis might live beyond the term of the leases, in which case a renewal might properly be made in her lifetime ; but even supposing her to die at any time whatever within this period, then that in twenty-one years after her death, the persons authorized by law to dispose of the property, might divide it at once, and thus prevent the future accumulation of the fund, and obviate the mischief which the rule of law intended to prevent.

Now the persons who would be entitled in that event, would be the children which Mrs. Curtis might leave and the persons entitled to the residue of the money, after answering the purposes which the testator intended to be effected. They might all be in a state competent to consent. Nevertheless, in that state of things, it is perfectly manifest, that although amongst themselves they might make a title to the fund to be accumulated for renewal, yet each of them would be uncertain as to the amount of his share, or of that which was his ; no one of them could say, such a share of this property is mine, I have a right to sell or dispose of it as I please, and in doing so, I am acting according to the intention of the testator.

[ 155 ]

In all cases of this kind, I apprehend, we are to look at the directions of the will, with reference to the property of the testator at the time of his death, and with reference to the persons, who,

under the directions of the will and according to the intention of the testator, may, at a future period, have a legal power to dispose of the property. If, according to the intention of the testator, some person or persons must not necessarily be in existence, with legal power to dispose of the property, within the period limited by the rule of law, then, I apprehend, the gift is too remote.

CURTIS  
v.  
LUKIN.

Now here, such was not the intention of the testator ; the intention, according to the argument which is used, was that the accumulation should go on, as to part of this at least, until the period when the last lease was about expiring, that is until 1868, which period, it is evident, might be beyond that limited by law ; if the contrary were done, it would be done, not in pursuance of any power given to them by the will, but in consequence of a power which they have, of coming to an arrangement amongst themselves, by which they compromise their respective claims under the will, and create for themselves aliquot defined shares in this part of this property, doing that for themselves, but proceeding in a manner directly contrary to the intention of the will.

I should have been very willing to have attended to any authority which might have been brought forward to support the proposition, that this might be done ; none has been cited. The case of *Saunders v. Vautier* (1), is, I apprehend, entirely different from this. It has frequently happened in this Court, that a testator has given to an individual an absolute vested interest in a defined fund, so that, according to the ordinary \*rule of law, he would have a power, of his own authority, to receive or dispose of it immediately on his attaining legal age ; but having given such a vested interest, the testator has, nevertheless, postponed the time of giving him possession, till a period subsequent to the legatee's attaining twenty-one, although in such cases, the party having attained the age of twenty-one cannot, according to the direct intention of the will, obtain possession, yet he has everything but possession ; he has the legal power of disposing of it, he may sell, charge, or assign it, for he has an absolute, indefeasible interest in a thing defined and certain ; the Court, therefore, has thought fit (I don't know whether satisfactorily or not), to say, that since the legatee has such the legal right and power over the property, and can deal with it as he pleases, it will not subject him to the disadvantage of raising money by selling or charging his interest, when the thing is his own, at this very moment. The Court has, in such cases, ordered payment on

[ \*156 ]

(1) 54 R. R. 286 (Cr. & Ph. 240).



CURTIS  
v.  
LUKIN.

his attaining twenty-one. I don't think that case is analogous to this, because there the property is defined and ascertained ; here it is not, for the shares cannot be ascertained until the period for renewal has arrived, when it will become known what sum is necessary for that purpose.

Besides this, I think there are other objections on the ground of uncertainty, which I do not think it necessary to enter into in detail, as my opinion is clear upon the grounds I have stated ; nevertheless, I may say that I think the uncertainty of the shares, which the children are to have, an uncertainty arising partially from the uncertain demand which they have upon the fund to be accumulated ; for the purpose of renewal is such, that nobody can tell what ought to be done under this trust.

[ 157 ]

On the joint ground of remoteness and uncertainty, it appears to me that this trust cannot be sustained ; I think this bill must be dismissed, and under the circumstances it must be

*Dismissed with costs.*

### THE ATTORNEY-GENERAL v. POTTER (1).

(5 Beav. 164—171 ; on appeal, 14 L. J. Ch. 16.)

1842.  
June 1.  
July 22.  
  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
  
On Appeal.  
1843.  
Nov. 21, 22.  
1844.  
Nov. 19.  
  
Lord  
LYNDHURST,  
L.C.

A testator bequeathed a leasehold and his residuary estate to A., B., and C. (his executors), on trust to permit A. to receive the rents and profits for life, and afterwards to pay certain legacies, and the residue to such of three persons, D., E., and F., as should be living at A.'s death. The executors permitted A. to retain possession of the leasehold during her life, and D., E., and F. executed a deed (which was also executed by B. the husband of D.), whereby they agreed to take as tenants in common : A. died. Held, that the executors had not assented to the legacies, either by permitting A. to retain possession of the leasehold, or by the execution of the deed by B., and that the executors could make a good title to the leasehold.

THIS information prayed, that an account might be taken of the duty payable on the legacies and residuary estate given by the will of the testator Arthur Phillip, and that the amount might be declared to be a debt due to her Majesty from the defendant James Potter and from John Lane, deceased ; and that it might be declared, that a leasehold house at Bath, which was part of the testator's estate, was liable to the payment of the debt, and that the same, or the proceeds arising from the sale thereof, might be made available for such payment ; and the same having been sold by James Potter to William Bowie, that Potter might be restrained

[ 164 ]

(1) *In re Venn and Furze's Contract* [1894] 2 Ch. 101, 63 L. J. Ch. 303.

from receiving the purchase-money, and that Bowie might be restrained from paying it to any but the Commissioners of Stamps, until the debt should be paid.

A.-G.  
v.  
POTTER.

The testator, Admiral Phillip, by his will dated the 20th day of May, 1814, after directing all his just debts and funeral and testamentary expenses to be paid, and after giving certain specific and pecuniary legacies and an annuity, gave his leasehold house in Bath, and the appurtenances, and his residuary estate to his wife Isabella Phillip, John Lane, Osborne Standert, Thomas Sutton, and James Potter, on trust to permit his wife and her assigns to take and receive the rents, interest, and profits thereof, for and during the term of her natural life; and after her decease, he gave several pecuniary legacies of considerable amount, and the residue \*was given to Susannah Richardson, Mary Ann Lancefield, Michael Dove, and Rebecca Ann Potter, or such of them as should be living at the time of his wife's death. He appointed his wife, John Lane, Osborne Standert, Thomas Sutton, and James Potter executrix and executors of his will.

[ \*165 ]

The testator died in October, 1814, and the will was duly proved by Isabella Phillip, the widow, and by Lane, Standert, and Potter. Sutton, the other executor named in the will, renounced probate. Standert died in 1816.

On the 17th of February, 1817, the four residuary legatees executed a deed, whereby it was arranged, that they should take and enjoy their interests as tenants in common. The deed was executed by James Potter the executor and the husband of Rebecca A. Potter who was one of the residuary legatees. The widow was permitted to enjoy the house during her life. She died on the 4th day of March, 1823, and thereupon John Lane, since deceased, and the defendant James Potter, became the surviving executors. After the death of the widow, the surviving executors paid the legacies which then became payable, and divided the residue, with the exception of the leasehold house, among the residuary legatees. In the month of April, 1823, the leasehold house was sold, for 1,800*l.*, to the defendant Mr. Bowie, who paid a deposit of 270*l.*, and in the month of August following he was let into possession, but the contract was never completed.

The executors computed the legacy duty payable to the Crown at 1,020*l.*, and it was stated that they gave to their solicitor a draft for that sum, which he received from their bankers, but neglected to pay it to the \*Stamp Office; and payment having been neglected

[ \*166 ]

A.-G.  
 v.  
 POTTER.

for several years, this information was filed in the Court of Exchequer for the purpose of recovering the amount due.

The decree, made on the 15th of May, 1838, directed an account to be taken of the duty due to her Majesty for the legacies and residuary effects of the testator, and declared that the defendant James Potter, as surviving executor, and the defendants Harriet Eleanor Lane and Sarah Rule, as executrices of John Lane, deceased (admitting assets), were bound to pay, what, upon taking the account, should appear to be due to her Majesty, with the informant's costs of suit, without prejudice, however, to any question between the parties entitled under the will, by whom such payment should be ultimately borne. And it was further declared, that the leasehold house was liable for the payment of the duty. And it was referred to the Master to inquire whether a good title could be made to the house, under the contract with Bowie, and if so, when a good title was first shown to Bowie; and if a good title could be shown, it was declared that the agreement should be specifically performed; and if it should be found that a good title could not be made, certain inquiries were directed; and the Master was to be at liberty to report any special circumstances.

On the 14th of February, 1842, the Master made a separate report, by which he found that a good title could not be made to the house at Bath; and to this report an exception was taken by the defendants, the executrices of John Lane deceased. The Master's report was founded on this: that the house had been specifically bequeathed to the testator's widow for her life, with remainder to the residuary legatees: that \*the executors assented to the legacy, and that the house had thereby ceased to be assets, and had vested in the legatees, and that therefore the executors could no longer make a title thereto.

[ \*167 ]

*Mr. Pemberton* and *Mr. Barlow*, in support of the exception, argued, that this was not the simple case of a legacy to one for life with remainder to others, but that, after the determination of the estate for life, the property was subject to legacies, which were to be raised, before the legatees in remainder could take what was given to them. That during the lifetime of the tenant for life, the property was not applicable to the payment of the legacies payable on her death; but becoming so applicable, before the legatees in remainder could take, and it being the duty of the executors to raise the legacies, their assent to the gift to the widow for life,

did not involve their assent to the legatees in remainder, so as to transfer to them the duty or the obligation which the testator had imposed on the executors. They argued also, that the fact of permitting Mrs. Phillip to enjoy the leasehold, according to the trusts of the will, did not constitute an assent to the legacy: *Doe d. Hayes v. Sturges* (1), *Richards v. Browne* (2), *Doe d. Sturges v. Tutchell* (3); and that the deed of 1817 was executed merely for the purpose of ascertaining and defining the shares of the parties in remainder, and that it was executed by Mr. Potter, not in his character of executor, but as the husband of Mrs. Potter, who was one of such parties entitled in remainder.

A.-G.  
POTTER.

[Enjoyment in specie they said did not constitute a specific legacy, the distinction between the two being clearly pointed out in *Pickering v. Pickering* (4).]

*Mr. Roupell and Mr. Wood, contra*, for Mr. Bowie the purchaser :

[ 168 ]

\* \* The executors' assent to the legacy is clearly proved, first, by the deed of the 17th of February, 1817, to which Mr. Potter, the executor, was a party; and, secondly, by the fact of the wife being left in the enjoyment \*of the house, and permitted to use it as her own from the time of the testator's death to her own death.

[ \*169 ]

[They cited *Cheyney v. Smith* (5), *Paramour v. Yardley* (6), *Young v. Holmes* (7), *Adams v. Peirce* (8), and *Goodenough v. Tremamondo* (9).]

*Mr. Pemberton*, in reply. \* \* \*

#### THE MASTER OF THE ROLLS :

July 22.

The Master has reported that a good title cannot be made to the house at Bath, and his report is founded upon the position that the house in question was specifically bequeathed to the testator's widow for life, with remainder to the residuary legatees: that the executors assented to the legacy, and that thereby the house ceased to be assets, and consequently, that the title thereto is vested in the legatees, and not in the executors.

The assent is said to be proved, first, by the deed of February, 1817, and, secondly, by the fact of the wife being left in the enjoyment of the house, and permitted to use it as her own, from the time of the testator's death to her own death.

(1) 17 B. R. 491 (7 Taunt. 217).

(6) Plowd. 539.

(2) 43 B. R. 119 (3 Bing. N. C. 493).

(7) 1 Str. 70.

(3) 37 B. R. 516 (3 B. & Ad. 675).

(8) 3 P. Wms. 12.

(4) 48 B. R. 104 (4 My. & Cr. 289).

(9) 50 B. R. 262 (2 Beav. 512).

(5) 1 Leon. 215.

A.-G.  
 v.  
 POTTER.  
 [ \*170 ]

The deed of February, 1817, was executed by the persons who were, or might become entitled to the \*reversion or remainder of the testator's residuary estate, expectant on the decease of Isabella Phillip the tenant for life, for the purpose of making the bequest to them more immediately and permanently beneficial and effectual, and to carry into effect an agreement into which they had entered, that all such benefit, or chance of survivorship as was given to them by the will, should be waived, and that their contingent interests should be converted into vested interests, whether any of them should die in the lifetime of Isabella Phillip or not. This deed was executed by James Potter, one of the executors, whose wife was one of the residuary legatees, but considering the object and intent of the deed, I am of opinion that the execution of it by one of the executors, cannot be deemed an assent to a legacy, depriving the subject of it of the character of assets.

[ \*171 ]

The effect of the widow having been permitted to occupy and enjoy the house, as her own, during her life, is to be considered. The whole estate was subject to all debts and legacies. Some of the legacies and an annuity were immediate gifts: others were payable on the death of the widow. Subject to the debts, to the legacies payable immediately, and to the annuity, the widow was entitled to the income of the residuary estate for her life, and after her death, but subject to the payment of several legacies which then first became payable, the ultimate residue was given over. The duty of all the executors, which they undertook upon accepting the office, was to pay the debts and all the legacies payable on the testator's death, ascertain the residue after such payments, give the widow the enjoyment of that residue during her life, and preserve it for the legacies which were to become payable on her death, and for the persons who were to be then entitled to it subject to those legacies. Upon the death of the widow, it became \*the duty of the surviving executors to provide for and pay the legacies which then became payable, and to pay the ultimate residue to the persons then entitled, and the executors do not appear to me to have acted otherwise than in conformity with their duty in these respects. Supposing the house to have been specifically given to the widow during her life, it was not the subject of a specific gift after her death; and at the time when she took possession, she had, besides her interest as legatee, a duty as executrix to preserve it, not merely for the legatees in remainder, but as part of the testator's assets, for payment of the legacies which became payable upon her death.

The other executors had the duty which they might have been compelled to perform, of permitting her to occupy the house according to the will, and the further duty of executing those trusts of the will, which were to be executed after her death; and it appears to me, that by acting according to the will in giving her possession of the house, they cannot be deemed to have divested themselves of their legal power to perform that part of their duty, which the testator had postponed till after her death.

A.-G.  
POTTER.

For these reasons, I think that the exception must be allowed.

The purchaser appealed from this decision, and the case was [ 14 L. J. Ch. 19 ] argued before the Lord Chancellor, by—

*Mr. Swanston, Mr. Roupell, and Mr. Wood*, for the appellant, and

*Mr. Bethell and Mr. Lloyd*, for the executors.

*Mr. Wood* replied.

THE LORD CHANCELLOR [after stating the will]:

1844.  
Nov. 19.

The leasehold house is mentioned as forming part of the personal estate, the whole of which was given to the wife. The trust was to permit her to receive it for her life; it was, therefore, to be enjoyed in specie, and was so enjoyed accordingly. On the death of the widow the trust was at an end, and the property was held by the executors for the general purposes of the will: whether as executors, or with the superadded character of trustees, is the question. They were to pay 2,000*l.* to other trustees, and legacies to other parties, and the annuity to the annuitant, if living. The testator directs them to be possessed of one of these legacies in trust for the issue of the legatee. The legacies were to be paid out of the general fund; the property given to the residuary legatees is subject to those payments, and no part of the residue is distinguished. I think, therefore, that the entire property became, after the death of the wife, general assets in the hands of the executors, and, therefore, that they could make a good title. The case is widely different from a bequest of a term to one party for life, and then to another. The case is not altered, I think, by James Potter's execution, in respect of his wife's interest, of the deed of arrangement. The exception, therefore, must be allowed.

## CAREW v. WHITE.

(5 Beav. 172—175.)

1842.  
 March 23.  
 April 15.

Rolls Court.

Lord  
 LANGDALE,  
 M.R.

[ 172 ]

A partner making entries in his private diary respecting partnership matters which he ought to disclose cannot resist production of the diary on the ground that the entries cannot be separated from other entries relating exclusively to his own private affairs.

THIS was the usual motion for the production of documents, admitted to be in the defendant's possession relating to the matters in question.

The object of the suit was to wind up the affairs of a late partnership between three solicitors.

The defendant, by his answer, admitted that he had in his possession certain diaries, which he had kept during the partnership, and in which he was "in the habit of making short memoranda or notes of the business daily transacted by him," on account of the partnership; he also stated as follows: "that he had also been in the habit, during the period aforesaid, of making entries in the said books or diaries, of all or many of his own private and family concerns, matters, affairs, and accounts, and that the same books did, in fact, contain the private journals of the acts, remarks, and observations of him the defendant, and which he never intended for the inspection of any one besides himself; and such private, and family matters, and affairs occupied as great, or a greater portion of the said books or diaries, than the short notes or memoranda of business transactions as aforesaid, and were intermixed and entered together with the said business memoranda in the same portion of the said books allotted for each day; and it was therefore absolutely impossible to seal up the said entries of private and family matters and affairs, from the said business memoranda, or otherwise to prevent the same from being seen or perused by any person having liberty to see or peruse \*the said business memoranda. That such business memoranda were very short, and were now, therefore, for the most part, become unintelligible, and that the same were entered in the said diaries, only for the purpose of enabling the defendant to enter his work therefrom into the proper books of the said last-mentioned partnership, called the "Office Work Books," and that he did, accordingly, enter full particulars of all his said business transactions in such Office Work Books in due course, and which said Office Work Books were open to the inspection of the said plaintiff at the

[ \*173 ]

office of the defendants, under and by virtue of the dissolution agreement."

CAREW  
v.  
WHITE.

*Mr. Pemberton* and *Mr. Glasse* moved for the production of these books amongst other documents.

*Mr. Kindersley* and *Mr. Hallett*, *contrà*, resisted the production on the ground of the inconvenience and annoyance that it would occasion the defendant, and urged that it was quite unnecessary for the purposes of this suit, as all the matters relating to the partnership business had been copied into the Office Work Books. They offered to furnish verified copies of the entries relating to the partnership matters.

The MASTER OF THE ROLLS said, that he was very desirous of relieving the defendant from the production of these private memoranda if it were possible, consistently with the rights of the plaintiff. That the case had better stand over to see what could be done, or if the usual order could be modified.

The case was mentioned again, when it appeared impossible to separate the part relating to the partnership \*from that relating to the defendant's private matters, or to seal up the latter. The whole was very closely written, and bound up together in large volumes.

April 15.

[ \*174 ]

*Mr. Pemberton* and *Mr. Glasse* were again heard for the plaintiff, and

*Mr. Kindersley* and *Mr. Hallett* for the defendant.

THE MASTER OF THE ROLLS (without hearing a reply) said :

I feel a strong disposition to protect *Mr. White* from the liability of producing these documents. The question, however, is one of right, and if I cannot, on some general principle, applicable to other cases as well as this, relieve *Mr. White* from making a discovery of those matters in these books which do not relate to the business of the partnership, the usual order must be made. If the entries relating to the business had been in a separate book the defendant would have been bound to produce it as relating to the partnership transactions. The plaintiff being clearly entitled to the production of the entries as to the partnership if they had been kept separate, can the right be altered by the circumstance that *Mr. White*, for his own convenience, has mixed them with his private concerns? When the case was before me on a former occasion, I was desirous



CAREW  
v.  
WHITE.

[ \*175 ]

of knowing if any thing could be added by affidavit. Mr. White has sworn that to the best of his knowledge and belief, there are no entries which have not been carried out in the partnership books, but it is admitted, that there is a variation between the original and the entry in the partnership books; besides this the carrying out was the act of Mr. White alone, and might have been done in a manner not approved of by the other partner, who would be entitled to compare them. I have affidavits on the other side, \*that on a former discussion as to certain partnership transactions, the entries in the partnership books not appearing clear, it was necessary to refer to the private diary to get accurate information on the subject. I am at a loss to find any general ground on which to protect Mr. White. As he has imprudently mixed his private matters with the partnership transactions, it is his duty to separate them, and if he cannot, he must necessarily suffer the inconvenience arising from his own act. The defendant is entitled to the usual order for sealing up those parts not relating to the partnership transactions, and he may, if he can, avail himself of this qualification.

### NASH v. MORLEY (1).

1842.  
June 2, 10.

(5 Beav. 177—185; S. C. 11 L. J. Ch. 336; 6 Jur. 520.)

*Rolls Court.*

Lord  
LANGDALE,  
M.R.  
[ 177 ]

A gift to be divided "among poor pious persons male or female, old or infirm, as the executors see fit, not omitting large and sick families if of good character," is a valid charitable bequest; the word "poor" extending through the whole sentence.

Where trustees have an option to apply funds to purposes which, though liberal or benevolent, are not such as are in this Court understood to be charitable, the trust cannot be executed here. Thus, the Court cannot execute a trust for private charity.

A bill was filed by one of several trustees of a charitable gift, the validity of which was disputed, against the co-trustee, who had refused to act, and the next of kin of the testator, to have it executed. The trustees had accepted the trust. Held, that the proceeding was not improper, and that the plaintiff was not bound to apply to the *Attorney-General* to proceed by information.

JOHN WILKINSON, the testator in this cause, by his will, dated the 20th of April, 1831, directed part of his estate to be laid out in the funds, and he thereupon proceeded and expressed himself as follows: "And that my executors hereafter named, and their heirs and assigns do receive the interest thereof, half-yearly, and divide it among poor pious persons male or female, old or infirm, as they see

(1) *Thomas v. Howell* (1874) L. R. 18 Eq. 198; and see *Kendall v. Granger*, post, p. 507.

fit, not omitting large and sick families if of good character." The testator made a codicil, dated the 29th of July, 1833, but he did not thereby alter the nature of the bequest in his will to poor pious persons. After the testator's death, doubts arose respecting the legal effect and construction of the will and \*codicil, particularly as to the effect or sufficiency of the charitable bequest "to poor pious persons," and also, particularly, as to the liability of the charitable bequest to make up the deficiency of the estate to pay a legacy of 10,000*l.* bequeathed by the codicil, and two other legacies of 10,000*l.* and 2,000*l.* Opinions of counsel were taken on the subject, which were in favour of the sufficiency of the charitable bequest, but considered that the fund made charitable by the will, was liable to make good any deficiency of the residue of the testator's estate to pay legacies.

NASH  
v.  
MORLEY.

[ \*178 ]

Under these circumstances, and to remove those doubts, and to prevent delay and expense in giving full effect to the charitable and other trusts of the will, the widow and next of kin of the testator executed deeds dated in September, 1833; and thereby they confirmed the will and codicil, and released their interest in the estate; to the intent that the charitable bequest and the other trusts of the will and codicil might be performed and carried into execution by William Nash, John Morley, and Jacob Wilkinson, as the executors and trustees thereof: "it being the clear intent and desire of all the parties, to enable the said William Nash, John Morley, and Jacob Wilkinson to apply, dispose of, and distribute the said personal estate and effects (after paying debts), upon the trusts and in manner expressed, declared, and directed, in and by the will and codicil, according to the true intent and meaning thereof, and of the testator, as in and by the will and codicil was expressed and declared, and had been ascertained and agreed upon, and consented to, as in the deed mentioned; any rule or construction of law or equity to the contrary thereof, in anywise, notwithstanding."

After the execution of these deeds, the funds were invested, and for some time applied upon the trusts \*mentioned in the will. Afterwards, the next of kin again raised a claim to the residue, and insisted, that the bequest in the will was not a valid bequest to charitable purposes, and that the testator's next of kin were entitled to the whole thereof. The plaintiff Nash, one of the executors, alleging himself to be desirous to apply the dividends for the charitable purposes in the will mentioned, but being unable to do so, by reason of the refusal of Jacob Wilkinson, a trustee and one

[ \*179 ]

NASH  
v.  
MORLEY.

of the next of kin, filed this bill against his co-executor and the next of kin to obtain the directions of the Court.

*Mr. G. Turner and Mr. Gaselee, for the plaintiff.*

*Mr. Pemberton and Mr. J. Humphry, for Thomas Nash and Jane his wife, who was a daughter and one of the next of kin of the testator [cited Morice v. The Bishop of Durham (1), James v. Allen (2), Ommanney v. Butcher (3), Horde v. Lord Suffolk (4), Williams v. Kershaw (5), and Ellis v. Selby (6).]*

[ 181 ]

As to the deeds of 1833, they contended that they merely confirmed the gifts by the will, and could not operate to make a gift valid which would otherwise be invalid, for the same objections to the nature of the trust would still apply.

*Mr. Kindersley and Mr. Simpson, for Jacob Wilkinson, one of the executors and next of kin of the testator.*

*Mr. Tinney and Mr. Dixon, for John Morley.*

*Mr. Wray, for the Attorney-General, insisted, [that the plain meaning of the testator was, that none but poor objects could partake of the benefit of the charity].*

[ \*182 ]

He argued also that the executors and next of kin had bound themselves by the deeds, and were wholly excluded thereby; that the trustees held upon some trust, and not beneficially for themselves, and that therefore \*either the Crown was entitled to the fund: *Middleton v. Spicer* (7); or that it was distributable amongst such objects as might be directed by sign manual. He cited the 43 Eliz. c. 4, to show that there were many public objects which were considered charitable in the sense that this Court would see to their performance. He also objected to the frame of the record, and argued that the plaintiff having accepted the trusts, had no right to come by a bill of his own, against his co-trustees and the *Attorney-General* to have the validity of his trust contested, but that he ought to have applied to the *Attorney-General* for his sanction to file an information.

[*Waldo v. Caley* (8), *Horde v. Lord Suffolk* (9), *Johnston v. Swann* (10), and *In re Franklin* (11) were cited.]

(1) 7 R. R. 232 (10 Ves. 521).

(2) 17 R. R. 4 (3 Mer. 17).

(3) 24 R. R. 42 (T. & R. 260).

(4) 39 R. R. 136 (2 My. & K. 59).

(5) 42 R. R. 269 (5 Cl. & F. 111, n.).

(6) 43 R. R. 188 (1 My. & Cr. 286).

(7) 1 Br. C. C. 201.

(8) 10 R. R. 165 (16 Ves. 206).

(9) 39 R. R. 136 (2 My. & K. 59).

(10) 18 R. R. 270 (3 Madd. 437).

(11) 3 Y. & J. 544.

## THE MASTER OF THE ROLLS:

The question is, whether a gift “to poor pious persons male or female, old or infirm, as the trustees see fit, not omitting large and sick families if of good character,” is a valid charitable gift, and I am of opinion that it is. If the words were such that this Court had not authority to compel the trustees to apply the funds to purposes strictly charitable, or technically so denominated, the trust could not be maintained: *James v. Allen* (1). The question in all such cases is, whether it is not only the duty of the trustee, but a duty, the performance of which will be enforced by this Court, to apply the whole fund to purposes which are here called \*charitable. If there be any option in the trustee to apply the funds to purposes, which, though liberal or benevolent, are not such as are in this Court understood to be charitable, the trust cannot be executed here. Moreover, if it be expressly declared, that the fund is to be distributed in private charity, it has been held that the Court cannot execute such a trust. The testator, in such a case, has shown that the party to whom the control of the fund is given, is not to have the fund beneficially, and he seems to have referred the distribution to private judgment, which this Court cannot control.

In the present case, the argument has been, that from the words used, the testator must be deemed to have meant a private and not a public charity, and a private charity being incapable of execution in this Court, the next of kin are entitled. In this, as in all other cases of the like kind, the difficulty, if any there be, arises from the ambiguous application of words. The expressions “public” and “private” are not used in precisely the same sense when we speak of public and private institutions, as they are, when we speak of distributing funds in public or in private charity. In the case of *The Attorney-General v. Pearce* (2), Lord HARDWICKE has stated it to be “almost impossible to say which charities,” i.e. (as I understand it), which charitable institutions “are public and which are private in their nature,” and in the argument of this case, no one has attempted to state the difference between a public and a private charity by any accurate definition. Here the objects are distinctly stated to be poor persons, and a gift to poor persons is a good charitable gift. The gift here is to poor pious persons, and the gift is not less a charitable gift, because the objects are to be pious, male \*or female, old or infirm. No particular persons are indeed

NASH  
v.  
MORLEY.  
June 10.

[ 183 ]

[ 184 ]

NASH  
v.  
MORLEY.

specified, and the gift is to be among such of the described objects, as the trustees shall see fit; and Lord HARDWICKE says: "Where testators have not any particular person in their contemplation, but leave it to the discretion of a trustee to choose out the objects, though such person is private, and each particular object may be said to be private, yet, in the extensiveness of the benefit accruing from them, they may very properly be called public charities. A sum to be disposed of by A. B., and his executors, at their discretion, among poor housekeepers, is of this kind" (1).

It was argued, that the word "poor" did not extend through the whole of the gift, and the direction "not to omit large and sick families if of good character," does not constitute a valid charitable gift. It appears to me, however, that by this clause the testator only meant to signify, that by the word "persons" he did not mean to restrict the trustees to individuals only, but to enable them to apply the charity for the benefit of poor families, and I think it clear that the word "poor" extends through the whole sentence; and I am therefore of opinion that this is a good and valid charitable bequest.

An objection was taken to the form of proceedings in this case, and there seems to be some ground for it on the part of those who make it; but I own I cannot come to the conclusion, that a trustee in the situation of this plaintiff has not a right to maintain such a bill as this. He alleges that he is desirous of carrying this trust into execution, and that he is prevented from doing so, by the refusal of his co-trustee. In such a state of circumstances, though [ \*185 ] I conceive that it would have \*been better for him to have applied to the *Attorney-General*, and to have informed him of the difficulty in which he was placed, in order that the trust might be carried into execution at the instance of the Officer of the Crown, still I cannot say he was bound to depend upon the *Attorney-General* in that respect, or that he has not a right to come here. Although there is no suggestion that the *Attorney-General* did, in this case, refuse his sanction, yet he might have done so, and I can hardly hold that this suit was improperly instituted without placing trustees like these, more in the discretion and power of the *Attorney-General* than they ought to be. I cannot therefore say that this suit was improperly instituted.

As to the question whether there is to be a reference to the Master to approve of a scheme, I should certainly direct a scheme

if the *Attorney-General* desired it, and thought it proper or useful in this case to direct one. If he does not I must order the defendants, the trustees, to concur with the plaintiff in executing the trust. There seems to be no difficulty in carrying the trusts into execution, as the trustees seem already to have executed the trusts subsequently to the execution of the deeds.

NASH  
v.  
MORLEY.

### PATERSON v. LONG.

(5 Beav. 186—187.)

1842.  
May 25.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.  
[ 186 ]

Two houses, held under one lease, were sold in separate lots, and it was stipulated that the purchasers should be parties to each other's assignment: Held, that the purchaser of lot 2 was not a necessary party to a suit for specific performance against the purchaser of lot 1.

This cause came before the Court on general demurrer.

Two houses, held under one lease at a rent of 8*l.*, were sold by auction, in separate lots, and by the conditions of sale it was stipulated, that the purchasers of the two lots should be parties to each other's assignment, and covenant to pay the proportion of the rent allotted to each, and to indemnify each other against the same, and also give mutual powers of distress and entry, upon and over the premises purchased by each, as an indemnity against the payment of more than the due proportion of the original rent of 8*l.* payable by each purchaser.

One of the houses comprised in lot 1 was purchased by the defendant Long, and the other by another person. Long having refused to complete his purchase on grounds which it is unnecessary to state, the vendor filed this bill against him alone, for a specific performance. The bill charged, that the purchaser of lot 2 was ready and willing to concur in all proper assignments of lot 1 to the defendant.

The defendant filed a general demurrer.

*Mr. G. Turner* and *Mr. Barlow*, in support of the demurrer, amongst other objections, insisted, that the purchaser of lot 2 ought to be made a party to the suit, as he was interested in the contract, and was bound to be a party to the assignment.

*Mr. Pemberton* and *Mr. Bearan*, *contrà*, contended he was not

[ 187 ]

PATERSON  
v.  
LONG. a necessary party, and could not properly be made a party, as he was not a party to the defendant's contract (1).

THE MASTER OF THE ROLLS :

If there is to be a specific performance of the contract, the purchaser of lot 2 will be bound to concur in the assignment, but is it necessary that he should be a party to all the litigation between the vendor and the purchaser of lot 1? I think not; besides this, the bill alleges that he is ready to concur. Although it might, by possibility, become necessary hereafter to compel him to join in the assignment, still, I see no reason for making him a party to a suit until that necessity arises.

*The demurrer must be overruled.*

1842.  
Feb. 23.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 188 ]

ALDRIDGE v. WESTBROOK.

PARSONS v. WESTBROOK.

(5 Beav. 188—193.)

A. being entitled to a moiety of an estate, covenanted to settle it on himself for life, with remainder to his wife and children. He afterwards purchased the other moiety from his brother B., and mortgaged the entirety to B. who, having no notice, obtained priority over the wife and children of A. By the will of B. the mortgage was given to his widow C. for life, with remainder to A. absolutely. A. died, and C., by virtue of the mortgage, received the rents of the entirety to the disappointment of the wife and children of A. C. afterwards died. Held, that the widow and children of A. had no equity as against the general creditors of A. to have a lien on the second moiety of the estate, to recoup the loss sustained by them by C.'s receiving the rents of the moiety of the estate bound by the settlement, from the death of A. to the death of C., but that they must come in as specialty creditors under the covenant.

A mortgagee filing a bill for the benefit of himself and the other creditors of the deceased, is entitled to payment of his mortgage money out of the mortgaged estate, before payment of the costs of suit.

THE second of these two suits was filed on behalf of the creditors of Richard Aldridge. The first suit was instituted by his children, to have the benefit of articles entered into by him on his marriage.

It appeared, that Richard Aldridge and his brother James Aldridge were equally entitled to an estate called Woodmacotes, which, in 1792, they mortgaged for 1,200*l.* to a Mr. Lee.

Richard Aldridge, being about to marry, executed articles of

(1) *Wood v. White*, 48 R. R. 152 (4 My. & Cr. 460).

settlement, whereby he covenanted, within three months, to convey his moiety of this estate to trustees, free from incumbrances, in trust for himself for life, with remainder to his wife for life, and with remainder to the children of the marriage.

ALDRIDGE  
v.  
WESTBROOK

In 1808, James Aldridge sold and conveyed his moiety of the estate to Richard, and on the 5th of October, 1808, Richard, in violation of the marriage articles, mortgaged the entirety of the estate to James for securing 1,000*l*.

In November, 1810, James died, having by his will given his real and personal estate to trustees, upon trust \*for his wife Anne for life, and after her death and subject, as to his personal estate, to some legacies, in trust as to the whole of his real and personal estate for his brother Richard Aldridge.

[ \*189 ]

On the death of James, Richard was indebted to him in the sum of 1,000*l*., secured by the mortgage, and in the further sum of 2,000*l*., for which he held no security. An arrangement was afterwards entered into, by means of which the trustees of James got in the first mortgage for 1,200*l*., and with it the legal estate, and Richard executed to them a mortgage of the entirety of the estate, for securing to them the sum of 4,200*l*., being the aggregate amount of the first mortgage of 1,200*l*., and the two sums of 1,000*l*. and 2,000*l*. due from Richard to the estate of James.

Neither James himself nor his trustees had any notice of the articles, and they were consequently unfettered thereby. The consequence was, that the widow of James, who was entitled to an estate for life in the mortgage for 4,200*l*. secured upon the entirety of the estate, had the benefit of this security from 1810 to her death, which had recently happened, and in respect thereof, she received during her life the whole amount of the rents of both moieties of the estate in question.

Richard died on the 5th of September, 1818, without having performed the covenant contained in the marriage articles. Upon his death his widow and children would, if Richard had duly performed the marriage articles and had not mortgaged the estate, have become entitled to the receipt of a moiety of the rents and profits of the estate; but from 1818 to the death of James's widow in 1841, their rights had been defeated by the paramount claims of the widow of James.

The mortgage for 4,200*l*., though valid as against the marriage articles of Richard, had recently, by the death of James's widow,

[ 190 ]



ALDRIDGE  
r.  
WESTBROOK.

and under the limitations of his will, fallen into and now formed part of the estate of Richard.

Some time after the death of Richard a bill was filed on behalf of his creditors, to obtain payment of their debts; and two of the children of James also filed another bill for the purpose of having the benefit of the marriage articles, and in that suit it was declared that they were entitled to have the benefit of the settlement. Under these circumstances,

*Mr. Pemberton* and *Mr. Randell*, for parties claiming under the articles, now contended, that they had, as against the general creditors of Richard, an equity to have the mortgage for 4,200*l.* kept on foot for the purpose of giving them a lien on the second moiety of the estate, to the extent of the amount of the rents of the first moiety, which through the breach of trust of Richard had been received by the widow of James, to the disappointment of the persons entitled thereto under the marriage articles.

*Mr. Kindersley*, for the creditors of James, *contra*, contended, that the parties claiming under the articles had no lien on the other moiety of the estate, and that they must come in, under the covenant, *pari passu* with the other creditors.

*Mr. Tinney*, *Mr. Busk*, *Mr. Turner*, and *Mr. Paton*, for other parties.

#### THE MASTER OF THE ROLLS :

[ 191 ] There is some complication in the facts of this case, and I have certainly had some difficulty in clearly comprehending \*the effect of those facts. [After stating the above circumstances his Lordship continued.] It has been declared, that the widow and the children of Richard are entitled to the benefit of the articles, or to the first moiety of the property, the legal estate of which has now, by the death of the widow of James, become available for the purposes of the settlement. The widow, therefore, of Richard, is now entitled for her life to receive the rents and profits of that moiety, and after her death the children will be entitled in remainder. The legal estate of that moiety is, therefore, entirely applicable to the purposes of the settlement; but it appears that the mortgage executed by Richard, comprised not only the moiety of Woodma-cotes, which was subject to the articles, but also the other moiety

of that property which, at a subsequent period, Richard purchased from James; and the widow of Richard now claims to be entitled to a lien upon that other moiety of Woodmacotes for the loss she has sustained. It is said that the mortgage being made for the benefit of Richard, and subsisting as a valid mortgage at the time of the death of James, when it was disposed of by his will, and being afterwards continued for the benefit of the widow of James, ought now to be continued for the benefit of the widow of Richard, who, by the act of Richard in making the mortgage, enabled the widow of James to intercept the rights of the widow of Richard under the settlement, and, for a time, wholly to deprive her of the rents of a moiety of the estate, to which under the articles she was entitled.

ALDRIDGE  
v.  
WESTBROOK.

Now what happened with respect to that moiety? The mortgage debt was a part of the estate of James. By the effect of the will of James that debt, as regarded the interest of Richard, ceased to be a debt. It was given to Richard, who by virtue of the mortgage was \*a debtor, but by virtue of the bequest, became at the same time a creditor. How is that debt to be kept up for the purpose of answering this claim? I apprehend that, if it could be done in any way, it would be, by having the mortgage, in the first instance, in some way distinguished from all the other property, as well of Richard as of James. In one sense, and in one sense only, is it distinguished from the property of James, because, if I understand the matter, the other property of James has been administered, and by virtue of the mortgage, the property has been heretofore enjoyed by his widow. On the other hand, the mortgage money received by Richard was never kept separate or apart: it constituted a debt due from Richard, and not a sum of money received by him and distinguished from the other part of his estate, in such a way that a lien could be established upon it for the benefit of his widow.

[ \*192 ]

Under these circumstances, I confess, though I have been a good deal affected by the ingenuity of the argument employed in the discussion of the case, which has shown very plausible reasons for it, and though I have felt a disposition, which, I think, every body must feel to establish the claim if it could be effected, I cannot see any mode of getting at a distinct part of the property of James, so as to make it subject to this lien for the benefit of the widow of Richard.

The estate of Richard will be administered according to the ordinary rules, and this and every other part of his property is subject to debts and claims which may be made upon it.

ALDRIDGE  
c.  
WESTBROOK.  
[ \*193 ]

The best opinion I can form upon this is, that I do not think this lien established, and the widow must therefore come in as a specialty creditor only, in respect \*of the violation of her rights under the marriage articles.

The Court, as I have been informed, decided another point in the second suit, the MASTER OF THE ROLLS holding, that where a creditor's bill was filed by a mortgagee who was also a creditor by simple contract, he was entitled to payment of his mortgage money out of the mortgaged estate, before the payment of any part of the costs of the suit.

### WILLATS v. BUSBY.

(5 Beav. 193—200; S. C. 12 L. J. Ch. 105.)

1841.  
Dec. 3, 6.  
1842.  
Jan. 15, 17, 18.  
May 10.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 193 ]

A decree made in the absence of a material party, but without prejudice to his rights and interests.

A. B. executed a voluntary settlement of real estate in favour of his wife and children, and afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife, children, and the trustees in whom the legal estate was vested. One of the children was out of the jurisdiction, and did not appear. The Court decreed a specific performance, and ordered the trustees to convey to the purchaser, saving the rights of the absent party.

IN 1812 Edward Sclater Busby, being seised of some freehold property at Bethnal Green, conveyed it by a voluntary post-nuptial settlement, to trustees, in trust for his wife Janet Busby, and afterwards for the children of their marriage, of whom there were two, viz. David William Busby and another son.

In 1834 Edward Sclater Busby contracted to sell the same property to the plaintiff Mr. Willats. The trustees, however, who had the legal estate, refusing to convey the property, the plaintiff, [ \*194 ] in consequence, filed \*this bill for a specific performance of the contract against Edward Sclater Busby, and wife, and their two children, and the trustees of the settlement.

David W. Busby was out of the jurisdiction of the Court, and could not be found so as to be served with process (1). The cause was now brought to a hearing without having David W. Busby before the Court.

*Mr. Pemberton, Mr. Kindersley, and Mr. James Russell, for the plaintiff.*

*Mr. Tinney* and *Mr. K. Parker*, for the wife of the settlor. \* \* \*

WILLATS  
%.  
BUSBY.

*Mr. Bethell* and *Mr. Bacon*, for the brother of David W. Busby, and

[ 195 ]

*Mr. Campbell*, for the representatives of the surviving trustees, supported the objection.

*Mr. Pemberton*, *Mr. Kindersley*, and *Mr. James Russell*, *contrà*.

\* \* The Court cannot adjudicate on the rights of an absent person; but that will not prevent a decision of the questions between those who are present. \* \* \*

*Mr. Tinney*, in reply. \* \* \*

[ 196 ]

His Lordship [after referring to some cases which had been cited where the court had declined to make a decree affecting the rights of absent parties] concluded that the objection, in this form, was not in the nature of a preliminary objection, and that he must hear the cause and see what, under the circumstances, was right, just, and convenient to be done.

1841.  
—  
Dec. 6.  
—  
[ 198 ]

The cause was then heard again upon the merits, and was argued by the same counsel.

\* \* \* \* \*

#### THE MASTER OF THE ROLLS :

When this cause was brought on for hearing, an objection was taken that David William Busby, one of the \*defendants, was out of the jurisdiction of the Court, and that in his absence no decree could be made against any of the defendants. The objection being overruled, the cause was heard, and it appeared to me that the plaintiff was entitled to a specific performance of the agreement stated in the bill; but that the decree should be framed so as to leave to the absent defendant a right of claiming any right or interest which he might have in the property; and on consideration I am of opinion that the decree ought to contain a clause stating it to be without prejudice to any right or interest in or to the premises comprised in the settlement, which may be claimed by the defendant David William Busby. The decree will therefore be as follows :

Decree that the agreement in the pleadings mentioned, dated the 19th day of March, 1834, be specifically performed and carried

1842.  
May 10.  
—  
[ 199 ]  
[ \*200 ]

WILLATS  
r.  
BUSBY.

into execution. And upon the plaintiff or the defendants Rushbridge and Harcourt, the legal personal representatives of the late plaintiff Henry Thomas Willats, paying the sum of 3,800*l.*, the residue of the purchase-money, it is ordered that the representatives of the surviving trustee in the indenture dated the 12th day of February, 1812, and all other necessary parties as the Master shall direct, convey the said premises to the plaintiff. And it is ordered that the Master do settle the conveyance in case the parties differ. And in case the Master shall find that the said David William Busby is a necessary party to such conveyance, and the said David William Busby shall not come in to execute the same, it is ordered that this decree be without prejudice to any right or interest which may be claimed by the said David William Busby in or to the premises comprised in the said indenture of the 12th day of February, 1812.

1842.  
*Feb.* 17, 19,  
26.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 201 ]

### DAVIES v. FISHER (1).

(5 Beav. 201—215 ; S. C. 11 L. J. Ch. 338 ; 6 Jur. 248.)

A testator gave his widow the power of appointing his residuary estate. By her will, after reciting the power, she declared that, in pursuance of the power and all other powers enabling her, for the purpose of disposing of her husband's and her own estate, she made her will as follows : she then directed her debts to be paid, and gave some legacies ; and as to all the rest, &c. " of her personal estate," she bequeathed the same to A. and B. upon trust, &c. : Held, that the widow (who died in 1832) had thereby appointed the residuary estate of her husband.

A gift of personalty to trustees for A. for life, and after his death in trust for the children of A. " as they severally attained twenty-five years." the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child of A. should live to attain twenty-five. Held to be vested, and not too remote (2).

THE testator James Davies, by his will, dated the 18th day of September, 1824, after directing payment of all his debts, and funeral and testamentary expenses, and giving divers pecuniary legacies, bequeathed all the residue of his estate, both real and personal, unto his wife, Ann Davies, deceased, her heirs, executors, and administrators absolutely, and he appointed his wife and William Powell his executors.

(1) General powers are now exercised by a residuary testamentary disposition. See Wills Act, s. 27, but decisions under the old law on the testamentary exercise of general

powers may still be applicable to the testamentary exercise of special powers since the Wills Act.—O. A. S.

(2) *In re Mervin* [1891] 3 Ch. 197, 60 L. J. Ch. 671, 65 L. T. 186.

On the 20th of September, 1824, the testator made the following codicil to his will. "Whereas by my will as aforesaid, bearing date the 18th day of September in the year 1824, I have directed my wife, Ann Davies, to be my residuary legatee: in case she the said Ann Davies dies without making a will after my decease, the remainder of all my property, whatsoever it may consist in, whether bank, consolidated, funded property, houses, furniture, plate, books, linen, wearing apparel, &c., to be equally divided, share and share alike, among my brother William Davies' four children, as named: William Davies junior, James Davies junior, Martha Ann West, and Mary Davies, or to as many of the aforesaid children as may be living at the decease of the said Ann Davies. Likewise I direct and appoint William Davies junior my residuary legatee instead of my wife, Ann Davies, and the forenamed William Powell."

DAVIES  
F.  
FISHER.  
[ 202 ]

The will and codicil were unattested.

The testator died in December, 1824. His wife, who survived him, made her will dated in April, 1832, and thereby, after reciting that the testator, James Davies, her late husband, did by his aforesaid will and codicil appoint her his residuary legatee, and direct in case of her death, without making a will after his decease, that his nephew, William Davies the younger, should be his residuary legatee, she the said Ann Davies, in pursuance of the power and authority given and reserved to her in and by the will of James Davies the elder, and of all other powers and authorities in anywise enabling her, did, for the purpose of disposing of all the estate of her said late husband, James Davies, over which she had any disposing power, and also of all her own estate and effects whatsoever and wheresoever, make her last will and testament in manner \*following (that is to say): First, she appointed James Fisher and William Powell executors of her said will; and after directing payment of her debts, and funeral and testamentary expenses, she bequeathed to James Davies, the younger, a legacy of 2,000*l*. Three per cent. Consolidated Bank Annuities, and to James Fisher and William Powell the sum of 4,000*l*. Three per cent. Consolidated Bank Annuities upon trusts therein mentioned, for Martha Ann West and her children therein mentioned; and after bequeathing several annuities and legacies, and directing her executors to appropriate so much stock out of her residuary estate as would be sufficient, in point of yearly income, to answer the same annuities, and directing that from the decease of the respective annuitants the same should sink into and form part of her residuary estate, she bequeathed to

[ \*203 ]

DAVIES  
r.  
FISHER.

James Fisher and William Powell her three leasehold messuages and premises, situate in Park Street, Islington, for all her estate therein, upon trust to sell the same, and apply the produce upon the same trusts as were thereafter declared concerning her residuary personal estate; and as to all the residue of her personal estate whatsoever, and wheresoever, and of what nature or kind soever not specifically bequeathed or disposed of by her will, she bequeathed the same unto James Fisher and William Powell, upon trust to sell, get in, and convert into money the whole of her personal estate, or such part thereof as should not consist of money in the funds or on Government, or real, or leasehold securities, and out of the produce thereof to pay her debts, funeral and testamentary expenses, and pecuniary legacies, and make the appropriations necessary for answering the said annuities. And upon trust to invest the clear surplus monies arising from her residuary estate, including the proceeds of the said leasehold houses, in manner therein mentioned. And she directed \*her trustees to stand possessed of her residuary estate, including the proceeds of her said leasehold houses, and the investments thereof, upon trust during the life of William Davies the younger, to pay the income thereof unto William Davies the younger, and from and after his decease in trust for the children of the said William Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child, the income to be applied during their respective minorities by the guardian for the time being of the said children or child for their respective support, maintenance, and education. And in case no child of the said William Davies should live to attain the age of twenty-five years, then in trust for the children of the said James Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal. And in case no child of the said James Davies the younger should attain the age of twenty-five years, then in trust for the children of Martha Ann West, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal; with a limitation over in the case of Martha Ann West having no child who should live to attain the age of twenty-five years.

[ \*204 ]

The testatrix afterwards made a codicil to her will, dated the 6th of May, 1832, and thereby gave certain specific parts of her personal estate to the persons therein named, but she did not otherwise revoke or alter her will.

DAVIES  
r.  
FISHER.

The testatrix died in June, 1832, and William Davies the younger having died in 1834, this bill was filed by his children, insisting that they took vested interests in the residuary estate bequeathed by the will of Ann Davies, including therein the residuary estate of the testator: that they were entitled to the payment thereof at twenty-five, and to have the income applied for their maintenance during their minority.

[ 205 ]

*Mr. Pemberton* and *Mr. Keene*, for the plaintiffs, contended that the gift to them, though given "as they severally attained the age of twenty-five years," was, nevertheless, a valid vested interest, the dividends being payable to them in the meantime: *Skey v. Barnes* (1), *Jones v. Mackilwain* (2), *Murray v. Addenbrook* (3), *Bland v. Williams* (4), *Vivian v. Mills* (5), *Blease v. Burgh* (6), *Saunders v. Vautier* (7). They argued also, that William Davies the younger was the substituted residuary legatee, and took in preference of the widow.

*Mr. Hardy*, for the representatives of William Davies the younger :

In no case can the representatives of Mrs. Davies be entitled, for the testator appointed William Davies junior "his residuary legatee instead of his wife."

*Mr. Chandless* and *Mr. Hoare*, for William Powell, one of the executors of the widow, and the surviving executor of the testator :

\* \* The limitation over is simply void as inconsistent with the previous absolute estate: *Ross v. Ross* (8). \* \* \*

[ 206 ]

*Mr. Roupell* and *Mr. Bilton*, for the executors of James Davies, and for his child [cited *Lewis v. Lewellyn* (9), *Napier v. Napier* (10),

(1) 17 R. R. 91 (3 Mer. 335).

(2) 25 R. R. 32 (1 Russ. 220).

(3) 28 R. R. 144 (4 Russ. 407).

(4) 41 R. R. 93 (3 My. & K. 411).

(5) 49 R. R. 372 (1 Beav. 315).

(6) 50 R. R. 165 (2 Beav. 221).

(7) 54 R. R. 286 (Cr. & Ph. 240).

(8) 20 R. R. 263 (1 Jac. & W. 154).

(9) 23 R. R. 201 (T. & R. 104).

(10) 27 R. R. 144 (1 Sim. 28), and see *Hughes v. Turner*, 41 R. R. 171 (3 My. & K. 666).



DAVIES  
v.  
FISHER.

*Bradly v. Westcott* (1), and other cases where a power was held not to be exercised by will].

*Mr. Kindersley and Mr. George Turner*, for the next of kin of Ann Davies, the widow :

[ \*207 ]

The property belonged absolutely to Mrs. Davies, under the will of her husband. There was an absolute gift to her in the first instance, which has not been cut down, for the gift to the children "as they attained twenty-five" is void. This has been settled by a long series of decisions; *Leake v. Robinson* (2), *Bull v. Pritchard* (3), *Vawdry v. Geddes* (4), *Ring v. Hardwick* (5), *Newman v. Newman* (6). The direction for maintenance is insufficient to make it vest; *Batsford v. Kebbell* (7); the \*maintenance is given merely during the minorities of the children, so that during the period which might elapse between their attaining twenty-one, and their attaining twenty-five, there is no gift to them of the dividends.

The property has been validly appointed to Mrs. Davies' executors, and the gift to the children being void, the executors are trustees for the next of kin of Mrs. Davies: *Goodere v. Lloyd* (8).

Again, the contingency has not happened upon which the property was given over by the will of the testator to the children of William Davies the younger, for the widow did not "die without making a will:" *Scott v. Bargeman* (9).

William Davies was substituted, not for Mrs. Davies, but for Mrs. Davies and William Powell who were executors, and the testator could not therefore have intended him to take as residuary legatee.

*Mr. Tinney, Mr. Wood, Mr. Spence, Mr. Bacon and Mr. Blower*, for other parties.

*Mr. Pemberton*, in reply.

Feb. 26.

THE MASTER OF THE ROLLS :

In this cause the principal question depends upon the construction which ought to be given to the residuary bequest contained in the will of Ann Davies.

James Davies, by his will dated the 18th September, 1824, gave

(1) 9 R. R. 207 (13 Ves. 445).

(2) 16 R. R. 168 (2 Mer. 363).

(3) 25 R. R. 27 (1 Russ. 213).

(4) 32 R. R. 196 (1 Russ. & M. 203).

(5) 50 R. R. 202 (2 Beav. 352).

(6) 51 R. R. 206 (10 Sim. 51).

(7) 4 R. R. 15 (3 Ves. 363).

(8) 30 R. R. 214 (3 Sim. 538).

(9) 2 P. Wms. 69.

his residuary estate to his wife Ann Davies absolutely for ever ; and by a codicil, dated two days \*afterwards, namely, the 20th September, 1824, he directed that if she died without making a will, the remainder of his property should be equally divided among his brother William Davies' four children.

DAVIES  
v.  
FISHER.  
[ \*208 ]

James Davies died, leaving his wife surviving him, and she was absolutely entitled to dispose, by her own will, of the residuary estate bequeathed to her by her husband's will.

By her will, dated the 4th April, 1832, she recited the will of her husband, and declared her purpose to dispose of all his estate, and also all her own estate ; and having thus declared her purpose, she proceeded, without making any distinction between his estate and her own, to dispose of the whole, as if it had been hers alone, and I think that she has done it in a manner sufficient to pass both. After giving several legacies, she gave the residue and remainder of her personal estate to Fisher and Powell, upon trust, to sell : to pay her debts and pecuniary legacies : to set apart sufficient sums to answer the annuities : to invest the surplus in their joint names, and stand possessed of the securities on which the same should be invested, in trust, during the life of W. Davies, to pay the interest, dividends and annual produce of her residuary personal estate to him, and she then proceeds as follows : " And from and after the decease of the said W. Davies, in trust for the children of the said W. Davies, as they severally attain the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child ; the income to be applied during their respective minorities, by the guardian, for the time being, of the said children or child for their \*respective support, maintenance, and education. And in case no child of the said W. Davies shall live to attain the age of twenty-five years, then in trust for the children of James Davies," in manner therein mentioned.

[ \*209 ]

The question is, whether the gift to the children of W. Davies is void for remoteness, and it is necessary to consider : first, the effect of the direction to divide between the children as they severally attained the age of twenty-five years ; secondly, the effect of the direction to apply the interest during the minorities of the children for their support, maintenance, and education ; and, thirdly, the effect of the gift over.

As to the first point, I think that if the directions to divide had stood alone, the gift would have been too remote. In this case, as

DAVIES  
v.  
FISHER.

in *Leake v. Robinson* (1), it is only through the medium of the directions given to the trustees, that we can ascertain who were the persons intended to take, and what benefits were intended for them. And the trust is for all the children of W. Davies as they severally attain the age of twenty-five years; none were to be excluded, and none to have any thing till the age of twenty-five years was attained. This would be too remote. But,

Secondly, expressions of this kind of themselves, importing a postponement of the vesting, may be so controlled by other expressions and circumstances, as to postpone payment or possession only and not the vesting; and it has been held, that a direction to apply the interest for the benefit of the legatee, affords evidence of intention to vest the capital; and it has not been [ \*210 ] disputed, that if the testator had directed the whole \*interest to be applied for the benefit of the legatees, during the whole time between the death of the tenant for life and the time of payment, and if there had been no gift over, it must have been held that the capital was vested; but in this case, as the direction does not extend to the whole time, but is confined to the minorities of the children, and as the application is to be by the guardian, for the support, maintenance, and education of the children, it was argued that the interval between the twenty-first and twenty-fifth year of each child, during which there is no direction to apply the interest, prevents the direction from being considered as a direction to apply the whole interest, and, therefore, does not afford the presumption that the whole was intended to vest.

In *Hoath v. Hoath* (2), *Walcott v. Hall* (3), *Murray v. Addenbrook* (4), and many other cases, the direction was to apply the whole interest; and the gifts were held to be vested. In *Leake v. Robinson* (1), and *Bull v. Pritchard* (5), the trustees had authority or power to apply the interest, or so much as they should think proper, or so much as they might deem necessary towards the maintenance of the children, and in *Vaudry v. Geddes* (6), the interest was at the discretion of the executors to be applied in the maintenance of the children, or accumulated for their benefit until they should severally attain twenty-two years of age, and in these cases it was held, notwithstanding the power, authority, or direction to apply the interest or part of it to the maintenance of the

(1) 16 R. R. 168 (2 Mer. 363).

(5) 25 R. R. 27 (1 Russ. 213).

(2) 2 Br. C. C. 4.

(6) 32 R. R. 196 (1 Russ. & My.

(3) 2 Br. C. C. 305.

203).

(4) 28 R. R. 144 (4 Russ. 407).

children, that it was the vesting, and not merely the possession or time of payment which was postponed.

But too much reliance must not be placed on the expression “the whole interest,” which has been used in some of the cases. In *Lane v. Goudge* (1) 30*l.* a year, part of the interest was given to an annuitant for life. In *Jones v. Mackilwain* (2) an annuity of 100*l.* was given out of the interest to the father of the children, and in *Bland v. Williams* (3), there was a direction and not a mere power or authority to apply the interest, or a sufficient part thereof for the maintenance of the children, and to transfer the capital, with so much of the interest as should not be applied in maintenance, to the children, when and as they should attain twenty-four years, and in those cases the gifts were held to be vested.

I have found no case precisely like the present, in which payment being postponed beyond minority, the express direction to apply the interest extends only to the minority. The case is, that the testatrix, having expressed a trust as to her residuary estate for the children of William Davies, makes no distinct gift of interest, but proceeding as if she had already done what was requisite to entitle the children to the interest, she directs the interest to be applied for their support, maintenance, and education by the guardian during their minorities. She appears to me to express herself as if she considered the children entitled to the interest by the direction to divide the capital at a future period. She did not consider the interest and the capital to be blended together, but on the contrary, so expresses herself, as, by the direction, to imply a gift to the children of the benefit or enjoyment of the interest immediately after the death of the tenant for life. The inference or implication arises from the direction to apply the interest, \*and although the direction is limited to the minorities, it is not necessary, or I think reasonable to limit the inference or the implication in like manner, or to the mere time to which the direction applies. There is a gift payable at a future time, and a direction showing that the donees are to have the benefit of the interest on the death of the tenant for life. This direction expresses that, during the minorities, the interest is to be applied by the guardian for support, maintenance, and education, and there is no express direction as to the application of the interest after the minorities have ceased. At that time the mode of enjoyment

DAVIES  
r.  
FISHER.  
[ 211 ]

[ \*212 ]

(1) 7 R. R. 163 (9 Ves. 229).

(3) 41 R. R. 93 (3 My. & K. 411).

(2) 25 R. R. 32 (1 Russ. 220).

DAVIES  
r.  
FISHER.

expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment, and on this part of the case it appears to me, that the second part of the residuary bequest, the direction as to the application of the interest, qualifies the first direction for the division of the residue, and that the result of the direction to divide, followed by the direction to apply the income, would, without more, be to give vested interests in the residue to the children of William Davies.

Thirdly. But then it is argued that the gift over is wholly inconsistent with that conclusion, and shows that the testatrix could not have intended to give vested interests. The argument rests entirely upon *dicta* of Sir JOHN LEACH, in the cases of *Vawdry v. Geddes* (1) and *Bland v. Williams* (2).

[ \*213 ]

In *Vawdry v. Geddes*, that learned Judge is reported to have expressed himself thus : “ If the whole interest had been expressly given to the children until they attained twenty-two, I do not agree that the shares of \*the children would therefore have vested subject to be divested ; the case of *Batsford v. Kebbell*, which is referred to by Sir W. GRANT in *Leake v. Robinson*, is an authority directly in point against that proposition. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property ; but that presumption fails entirely, when the testator has expressly declared that the legacy is to go over, in case of the death of the legatee, before a particular period,” and in *Bland v. Williams*, he is reported to have said, that “ if the gift over, is simply upon the death under twenty-four, the gift could not vest before that period.”

It is to be observed, that in neither of these cases did the facts require any decision upon the points to which the *dicta* related.

In *Vawdry v. Geddes*, the gift over to the surviving children of any sister was upon the death of any of such children without leaving issue ; and the gift over to the surviving sisters and their children or issue, was upon the death of all the children of any of his sisters without issue. The question related to a share of residue, not to a particular legacy, and there was no distinct gift of interest as in *Batsford v. Kebbell*, but a direction to apply or accumulate the interest till the age of twenty-two.

In *Bland v. Williams*, the gift over was upon the death under twenty-four without leaving issue, and the gift was held to be vested.

(1) 32 R. R. 196 (1 Russ. & My. 207).      (2) 41 R. R. 93 (3 My. & K. 411).

The proposition which, in argument, was founded upon these *dicta* of Sir JOHN LEACH is, that in a case \*where there is a gift payable at a future time, in terms which in themselves import contingency, and a subsequent direction to apply the interest, in a manner, which, notwithstanding the contingent form of the gift, would, in the absence of any gift over, vest the legacy, the mere circumstance of a gift over, simply on the death before the time of payment, does of itself prevent the vesting.

In ordinary cases, a gift over upon a contingency does not prevent vesting in the first donee, for, although it is reported that in the case of *Scott v. Bargeman* (1), Lord MACCLESFIELD stated the reason for his decision to be, that the shares of the legatees did not vest absolutely in any of them, in regard it was possible all might die under twenty-one or marriage, in which case it was devised over, yet in *Skey v. Barnes* (2) Sir WILLIAM GRANT observed, that the reason seemed to imply a proposition that is untenable in law, viz., that the mere circumstance of all the shares being given over on a contingency, does of itself, and without more, prevent any of the shares from vesting in the meantime; and he added, that he took it to be clear, that a devise over upon a contingency had no such effect, provided the words of bequest were in other respects sufficient to pass a present interest. Such a devise over of the entirety may, indeed, be called in aid of other circumstances, to show that no present interest was intended to pass; but that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

Now, in the present case, it appears to me that the words of bequest to the children of William Davies are sufficient to pass a present interest. Such appears to me to be the true construction of the words which the \*testatrix has used, and when we have once reached the result or meaning of the words under consideration, I apprehend that effect should be given to that meaning, just as if it had been expressed in direct and unambiguous terms. The meaning must, indeed, be collected from the whole will; but the gift over does not, in this case, appear to be accompanied by any other circumstances, tending to show that no present interest was intended to pass; but, on the contrary, affords some evidence of an intention to divest after a previous vesting. And, on the whole, it appears to me that the residuary bequest to the children of William Davis is valid.

DAVIES

F. FISHER.

[ \*214 ]

[ \*215 ]

(1) 2 P. Wms. 69.

(2) 17 R. R. 91 (3 Mer. 340).

## SCOTT v. MILNE.

(5 Beav. 215—221; affirmed, 12 L. J. Ch. 233; 7 Jur. 709.)

1841.  
Feb. 18.  
—  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
On Appeal.  
1842.  
July 18.  
1843.  
Feb. 15.  
—  
Lord  
LYNDHURST,  
L.C.  
[ 215 ]

In the absence of fraud imperfect partnership accounts which have been long acquiesced in will not be re-opened although shown to be defective and not finally settled, but where the accounts disclosed outstanding demands in respect of which subsequent receipts are admitted an account of such subsequent receipts may be directed.

IN 1806, James Milne and his son James Milne the younger, entered into partnership as tailors, on the terms stated in a deed made and executed between them.

IN 1808 the son died, leaving his wife sole executrix and legatee.

In November, 1812, she married the plaintiff Mr. Scott, and shortly previous thereto, viz., in October, 1812, James Milne the elder, furnished Mr. and Mrs. Scott with two accounts, the first headed, "The stated account of the partnership of Messrs. Milne," which showed on one side the gross amount of the sales during the \*partnership, and of the stock at its conclusion, and on the other, the capital of the partners, leaving a balance of net profits of 3,862*l.*, and outstanding debts remaining due to the partnership amounting to 2,094*l.* It also stated, that all the debts due from the partnership were satisfied.

The second account was headed, "Mr. James Milne in account with Mrs. Milne, the widow of his late son," and stated, on the one hand, the son's share of the capital and profits, and on the other, payments made on account thereof, and showing a balance of 167*l.* due from the widow, which was stated to be deducted from the receipt of outstanding debts.

These accounts were of a general or summary nature, and did not comprise the items of the account but merely stated the gross result.

James Milne the elder died in October, 1834, and two years after, the plaintiffs made an application to the defendant, the widow and executrix of James Milne the elder, for accounts of the partnership. In August, 1836, a Mr. Starling, who acted for the defendant, furnished the plaintiffs with an account which was headed as follows, "An account of cash advances to and expenditures on account of the late Mr. James Milne, jun., made by the late James Milne, sen., being payments on account of the claim of Mr. W. G. Scott, and Mary his wife, under the partnership estate of Messrs. Milne & Son."

It set forth a number of payments alleged to have been made by

[ \*216 ]

James Milne the elder to his son and to the plaintiff Mrs. Scott respectively, from the 8th of May, 1806, to the 10th of November, 1812, both inclusive, and amounting in the whole to the sum \*of 2,279*l.* 12*s.* 6*d.*, and at the foot of the account was the following memorandum in writing, signed by Margaret Milne. "I hereby claim to be allowed to me all the before mentioned sums of money, amounting in the whole to the sum of 2,279*l.* 12*s.* 6*d.*, out of and towards satisfaction of the share of capital of my late son, besides his advancement of 500*l.*, and also his share of profits under the late partnership estate of Messrs. Milne & Son, to be ascertained by an account I have engaged to furnish you of the same, over and above such other sum and sums I may be enabled to show has been paid to or advanced on account of my late son's interest in the said partnership. As witness my hand this 18th day of August, 1836. Margaret Milne."

SCOTT  
v.  
MILNE.  
[ \*217 ]

The defendant soon afterwards sent to the plaintiffs a further account, which was headed, "An account of the receipts and expenditures under the partnership estate of Messrs. Milne & Son," furnished by Mrs. Margaret Milne, executrix of the late Mr. James Milne the elder, who was the surviving partner. In this account credit was given for monies received by James Milne the elder, both before and after the accounts were rendered by him in the year 1812.

In 1838 the plaintiffs filed this bill against the defendant, praying a general account of the partnership transactions.

The bill alleged that errors existed in the several accounts, which errors were not, however, proved.

There was no evidence to show that the two accounts rendered by the testator in 1812 had not been acquiesced in, from the time they were delivered, down to the death of James Milne the elder in the year 1834; but \*it was alleged by the bill, and admitted by the answer, that sums had been received by James Milne the elder, subsequent to 1812, on account of the outstanding debts, but which the answer also stated had been accounted for.

[ \*218 ]

The defendant insisted that the accounts were settled and acquiesced in; that she was protected by the Statute of Limitations, and was not bound to account at all, or at most that she was only bound to account for the debts received since 1812. She also imputed improper conduct to Mr. Starling in procuring her to sign and send the accounts, and she said that he acted as the agent, and was in the interest of the plaintiffs,



SCOTT  
v.  
MILNE.

The cause now came on for hearing.

*Mr. Pemberton* and *Mr. Wood* for the plaintiffs, contended they were entitled to a general account. That the accounts were still open and subsisting, and that no settled account had been shown, and that even those of 1812 did not contain the items, but were general in their nature; and, lastly, that the conduct of the defendant had been such, as to waive any objection arising from lapse of time or acquiescence.

*Mr. Tinney* and *Mr. Ellison* for the defendant, contended, that the plaintiffs having acquiesced in the account for twenty-two years were barred by the Statute of Limitations and their own *laches* from unravelling the account, that the defendant was not liable at this distance of time to account at all, and at all events, only for the receipt of the outstanding debts.

That the accounts had been rendered by the defendant merely for her satisfaction, and under the wrong advice of *Mr. Starling* who was intimately connected with the plaintiffs, and that she had done so \*under the impression that her legal rights would not be prejudiced.

[ \*219 ]

*Mr. Pemberton*, in reply.

[None of the cases cited were referred to by the Judge.]

#### THE MASTER OF THE ROLLS:

The accounts rendered in 1812, though summary, show that great care was taken to ascertain what the state of the account between the parties at that time was. The evidence is wholly silent as to how the accounts were made out, or what access was given to the books, or what examination of them took place at the time. The accounts were delivered in October, 1812, and it is not shown that they were not acquiesced in without any objection from the time of their delivery to the death of *Milne the father*. *James Milne*, the father, died in October, 1834; and two years afterwards application was made to *Mrs. Milne*, his legal personal representative, for an account. That account was rendered by *Starling*, who it is proved was consulted by the defendant; the books were examined by him, and by a letter it appears that he communicated with her in respect of what he was to do, and an account was sent in

consequence of her instructions. This account comprised not only the transactions of the partnership previous to 1812, but those subsequent which related to the outstanding debts. Another account was \*also rendered of the sums advanced to the son and his widow, being the same sums for which James Milne the elder took credit in the account of 1812. Disputes took place, and in 1838 this bill was filed, praying for a general account. This lady by her answer, after admitting that the account was rendered, states that she did it by bad advice, suggests that Starling acted in collusion with the plaintiffs, insists she ought not to be bound by the accounts, and that the matter ought to be treated as if the accounts had not been rendered; and she claims to be exempted from accounting, in consequence of the lapse of time. Starling is examined for the plaintiff, but he is not cross-examined; no cross bill is filed; but the defendant claims what she might possibly have been entitled to if there had been a cross bill and the facts had been fully proved. I cannot however on this record think that the defendant is entitled to any such relief; there is no ground established in the evidence for imputing misconduct to Starling, and I cannot assume misconduct in him.

SCOTT  
v.  
MILNE.

[ \*220 ]

The case then is a very short one; the account was delivered in 1812; at that time it might have been thoroughly investigated, and there is no evidence to show that every opportunity for investigation was not given. It appears to have been acquiesced in, from the time when it was delivered to the time when the demand was made for a general account. If that demand had not been complied with, I should say, without the slightest hesitation, that there had been such an acquiescence as ought to bind the parties. The question is, whether what took place afterwards is to take away the effect of the acquiescence, and I think it ought not. My opinion is, that I ought not to open the accounts; but the receipt of outstanding debts subsequent to 1812 being admitted, I must direct an account in respect of the outstanding debts.

Seeing that the account of 1812 admits there were outstanding accounts to a considerable amount which it was the duty of the surviving partner to collect, and seeing by the account subsequently rendered that that collection did take place, and there being no reason for believing that any one of the sums were ever divided between the parties entitled, there is no reason for refusing an account of the monies received by the surviving partner after the date of the account of 1812.

[ 221 ]

SCOTT  
v.  
MILNE.

[The plaintiffs appealed from this decision, as reported in 12 L. J. Ch. at p. 235.]

[12 L. J. Ch.  
235 ]

*Mr. Bethell* and *Mr. Wood* appeared for the plaintiffs, and

*Mr. Tinney* and *Mr. Ellison*, for the defendant.

1843.  
Feb. 15.

THE LORD CHANCELLOR [after stating the facts and referring to the absence of items in the accounts, said] :

[ 236 ]

If a party chooses to acquiesce in an account stating only results, where they are intimately connected in this way, it must be because they were satisfied the account was correct; and I do not think after a period of twenty-two years, twenty-four years I think, and after the death of the party who could best explain the nature of the account, that a bill of this description ought to be sustained.

But then there is another circumstance that was relied on, and which is really the main question in the cause. When an application was made to the widow she at once acceded, and desired accounts to be made out; and two accounts were made out and rendered, corresponding in some respects with the account which had been before stated: I mean in its form, for it was an account of the monies which had been received from time to time, or paid on account of the son, and which account corresponded very nearly with the account as rendered in 1812. Then, on the other hand, there was the account of the proceeds of the partnership and the disbursements, which account does not correspond, but deviates in some material particulars from the account which had been so rendered; but it does not appear to me, that at the time when the application was made to this lady, for the purpose of rendering these accounts, she was aware exactly of what had taken place in 1812. She knew that some settlement had taken place, but there is nothing to show she knew exactly what the nature of that settlement was. It was said by *Mr. Bethell*, I find on referring to my note, that if she did not know it, *Mr. Starling* did. Now, *Mr. Starling*, it appears, (and that is the only circumstance from which we can infer it,) was the messenger, who carried this account at the time when it was made out to *Mrs. Scott*; but there is nothing to show that he was apprised or knew what the contents of the account were. At all events, it is quite clear, they were not fresh in his mind, and I refer for that purpose to his letter of the 6th of October, which is in evidence, and which he addressed to the widow

of the surviving partner, from which I collect that neither he nor the widow knew exactly what the nature of the account was that had been so rendered. Under such circumstances, I do not think the desire manifested by the widow to give the explanation ought to make any alteration in the case. I think, after a period of twenty-two, or rather of twenty-four years, the party is concluded from proceeding in a court of equity for the purpose of opening this account. It is said, that there was an error on the face of the account, but that error was not insisted on before the Master of the Rolls. Another error was insisted on, that was explained in the course of the inquiry. The error here insisted on is, that no interest was allowed upon the 500*l.* which had been so advanced ; but if there was an error, it was an error apparent on the face of the account, and the account was rendered twenty-two years ago. It ought to have been set right long before this time. The party had an opportunity of knowing it, of investigating it, of making inquiry of the surviving partner ; and therefore I think it is too late to say, because there is an error of that description on the face of the account, that therefore the account ought to be entirely unravelled. But I doubt very much whether there is any such error, because that 5*l.* per cent. was not a debt due from Milne, the surviving partner ; he was not to pay the 5*l.* per cent. ; the partnership was to pay it ; it was a disbursement from the partnership, and it might well be included under that general item of disbursements during the three years. It was the partnership that was to pay the interest, and therefore it might properly be entered as a disbursement. It does not therefore appear to me, that of necessity there is any error in that account, or the interest might have been paid in various ways, which might have admitted of explanation if the subject had been canvassed within a reasonable time after the account was settled. I am of opinion, therefore, that the general account cannot be opened, but I agree of course with what was stated by the MASTER OF THE ROLLS, that there must be an \*investigation as to the outstanding debts, of which it does not appear in evidence that any settlement ever took place. Therefore, I think, that the order of the MASTER OF THE ROLLS must be affirmed in the way in which he has settled it, and, I think, from the nature of it, it must be

SCOTT  
v.  
MILNE.

[ \*237 ]

*Affirmed with costs.*

1842.

Jan. 12, 13,  
17, 29.*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 224 ]

## THORPE v. OWEN.

(5 Beav. 224—227; S. C. 11 L. J. Ch. 129.)

A testatrix gave her personal estate to B. for the benefit of B.'s daughters. B. invested the produce, together with 1,000*l.* of his own monies, in the funds in his own name, and afterwards treated and admitted the aggregate fund as held in trust for his daughters. On the death of B. the fund was found mixed with like funds of his own: Held, that under the circumstances, there was sufficient to constitute a trust of the 1,000*l.* in favour of the daughters.

In February, 1827, the mother of Henry Owen died, having by her will given her personal estate to the six daughters of Henry Owen, and she appointed him sole executor.

Henry Owen converted the whole personal estate, and invested it with a further sum of 1,000*l.*, part of his own money, in the purchase of 2,550*l.* 8½ per cent. Reduced Annuities.

In 1830 the eldest daughter came of age, when the testator paid her 455*l.* 15*s.* 6*d.* one-sixth of the whole fund, she giving a receipt for it as one-sixth of the estate of her grandmother and of the addition made thereto by Henry Owen the father, "amounting in the whole as above."

In 1834 another daughter came of age, when one-fifth of the residue of the aggregate fund was paid to her, on her giving a receipt for it, incorrectly describing it as one-fifth of the personal estate of the grandmother.

[ 225 ]

In 1838 a third daughter married Mr. Sadler, when her father covenanted to settle the "contingent share" in the legacy given by the grandmother's will, on certain trusts.

Accounts of the grandmother's estate being required on behalf of Sadler and wife, they were furnished by Henry Owen, through his solicitors, on the 20th of July, 1840. In them, the 1,000*l.* was included in the following terms: "1827, March 7th, added 1,000*l.*;" and one-fourth of the 2,550*l.* and dividends were stated to be due to Sadler and wife. Henry Owen also stated, in a letter accompanying the account, that he was ready to assign and pay over the 637*l.* 10*s.* to Sadler's trustees, and to account for the dividends.

On the 28th of July, 1840, the solicitors of Henry Owen, in answer to the last letter accompanying the account, wrote to him to the following effect: "You mention in yours received this morning, that the 1,000*l.* mentioned in your account was your own money. Now if so, *Quere* 1. We think that it should be kept out of the account now to be handed to Quilter and Taylor (the solicitors of Mr. and Mrs. Sadler), though you might, if you pleased, pay over

to Mrs. Sadler's trustees any larger sum than that which should appear strictly due from you.

THORPE  
v.  
OWEN.

"*Quere* 2. Was the 1,000*l.* a voluntary gift on your part without any legal obligation or debt?

"*Quere* 3. If so, we suppose this mode of giving a portion to your daughters was adopted as a convenience to yourself, since you would have the trouble of managing the fund of which you were trustee."

Henry Owen returned this letter to his solicitors, having written opposite the above *queries* as follows :

[ 226 ]

"*Quere* 1. As I have hitherto made the 1,000*l.* part of the testatrix's property, I cannot alter it.

"*Quere* 2. Yes.

"*Quere* 3. Yes."

In November, 1840, Henry Owen paid the trustees of Sadler and wife 44*l.*, for two years' dividends on 637*l.* 10*s.* stock ; and in the letter forwarding it through his solicitors, he again stated, that the trustees of Sadler were entitled to one-fourth of 2,550*l.* stock and of the dividends.

In April, 1841, a release was prepared from the instructions of Henry Owen, which was executed by one of the parties, but was not executed by him in consequence of his death. It purported to be a release from one-fourth of the 2,550*l.* stock.

Henry Owen died in June, 1841, when the fund was found "amalgamated" with other stock of his own, and made together a sum of 6,850*l.* 3½ per Cents. which was still standing in his name. A petition was presented in the cause, for the purpose of determining the question, whether the 1,000*l.* voluntarily invested by Henry Owen in his own name, was affected with a trust in favour of his daughters ?

*Mr. Pemberton* and *Mr. Josiah W. Smith*, for the widow and personal representatives of Henry Owen, stated the facts of the case.

*Mr. Kindersley*, *Mr. Stinton*, and *Mr. C. Hall*, for the daughters and their trustees, contended that the testator had devoted the 1,000*l.* to the same trusts, as those on which he held the personal estate of his mother, and that he had done sufficient to affect him with the trust, so as to bind his representatives.

[ 227 ]

*Mr. Tinney*, *Mr. O. Anderdon*, *Mr. Collins*, and *Mr. Trotter* contended, that as no legal interest in the 1,000*l.* had passed from

THORPE  
r.  
OWEN.

the testator, and as there had been no declaration of trust, this Court could not assist volunteers in perfecting an incomplete trust. That this fund must, therefore, be considered part of the general estate of Henry Owen. [*Antrobus v. Smith* (1), *Edwards v. Jones* (2), *Jefferys v. Jefferys* (3), and other cases were cited.]

The MASTER OF THE ROLLS ordered the cause to stand over to see if any further evidence could be produced. On a subsequent day, he held that a trust had been declared of the 1,000*l.* in favour of the daughters, and he directed payment thereof accordingly.

1842.  
Feb. 14, 16,  
21.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.  
[ 229 ]

## GORDON v. THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY.

(5 Beav. 229—241 ; S. C. 2 Rail. Cas. 800.)

Distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer. In the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever.

THIS case came before the Court upon a general demurrer to the whole bill, and on a motion for an injunction.

[ 230 ]

The bill stated, that in 1836 a bill was brought into the House of Commons authorising the defendants to make their railway, which it was proposed should pass through the plaintiff's estate, and that the plaintiff, apprehending annoyance therefrom, opposed the bill.

An agreement was, however, come to between the parties, by which it was, among other things agreed, "that no public station should be established on the estate without permission."

The Act passed; and by the 15th section, it was enacted as follows: "That it shall not be lawful for the said Company to make or establish any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of the said Robert Gordon, his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said Robert Gordon, his heirs or assigns, for that purpose had and obtained."

(1) 8 R. R. 278 (12 Ves. 39).

(3) 54 R. R. 249 (Cr. & Ph. 138).

(2) 43 R. R. 178 (1 My. & Cr. 226).

The defendants had, however, lately made a well and tank, and built two wood cottages, and an engine-house and stable on the property, and within the prescribed limits; and they had lately dug the foundations for and commenced the erection of a stone building of a permanent character (which was intended as a dépôt for coals, coke, and ashes) on part of the land.

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

The bill alleged, that the trains stopped at the point in question for the purpose of changing the engines; and after stating the inconveniences resulting to the plaintiff and his family, it prayed an injunction to restrain \*the defendants from using the said engine-house, cottages, and other buildings so erected as aforesaid, or any of them, for depositing, receiving, loading, or keeping any passengers or cattle, or any goods, engines, or other articles, matters, or things, and from continuing the erection of the buildings, so commenced, and from making, erecting, or establishing upon the plaintiff's lands, or within fifty yards of the boundaries thereof, any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things.

[ \*231 ]

To this bill the defendants filed a general demurrer, which now came on for argument, together with an application on behalf of the plaintiff for an injunction.

*Mr. G. Turner* and *Mr. W. P. Wood* in support of the demurrer, and in opposition to the motion for an injunction, contended that the defendants had not acted in contravention of the Act.

[Upon this point the MASTER OF THE ROLLS ultimately expressed his opinion in favour of the plaintiff, and the question of construction is not included in this report.]

The plaintiff, they also said, had acquiesced in such a way as to disentitle him to relief. \* \* \*

[ 232 ]

*Mr. Pemberton*, *Mr. Kindersley*, and *Mr. Goldsmid*, *contrà* [upon the question of acquiescence, said]:

As to acquiescence, the plaintiff has been lulled by the representations of the officers of the defendants. He protested all along, and being naturally desirous of avoiding coming to this Court, he took no legal proceedings until his rights were disputed; this first happened on the 30th of December, when the defendants claimed adversely the right to make this erection.

[ 233 ]



GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

Acquiescence upon an application for an injunction, is different from acquiescence upon demurrer. In the one case, it merely disentitles the plaintiff to the protection of the Court by special injunction, but in the latter case, it must amount to such a waiver of his rights as to destroy the right altogether.

THE MASTER OF THE ROLLS [upon the question of acquiescence, said]:

The argument as to acquiescence is, no doubt, very important upon the consideration of the motion for an injunction. A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by any interlocutory order, even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must assume that the plaintiff originally had a right, but that he has altogether deprived himself of it, by his acquiescence. There is clearly no such acquiescence in this case. The plaintiff

[ \*234 ] seems to \*have objected all along to the proceedings of the defendants, and the answers of the defendants' officers seem to have been such, as to have lulled him until the 30th of December, when, for the first time, they claimed, under the Act of Parliament, a right to do the acts here complained of. \* \* \*

The motion for the injunction was then discussed, but it is not necessary to repeat the arguments.

Feb. 16.

THE MASTER OF THE ROLLS [after dealing with the question of construction of the Act of Parliament, said]:

[ 237 ]

The next objection is, that this gentleman has acquiesced so long, that he is not entitled to the protection of the Court. I cannot help being surprised at the perseverance with which that argument has been urged: I am of opinion that there is no such acquiescence as to deprive the plaintiff of the protection of the Court. That he knew of what was going on, seems to me to be

[ \*238 ]

\*beyond all doubt. I think the knowledge of his agent must be considered as his knowledge; but at every period of the work from its very commencement, it appears to me perfectly clear he was objecting to the proceedings. The application he made to the directors was in the nature of an objection; the conversation he had with Mr. Brunel was in the nature of an objection; and

in fact it must be assumed, I think, that if there had been anything which the Company thought to be acquiescence, I should have heard of it in a very different form from that in which it is suggested to me; I should have had it in evidence. Then it is said there was delay in filing the bill. Was that a delay which gave the defendants any right, or deprived the plaintiff of any? He saw something going on which he objected to, which he considered to be a violation of his rights under the Act of Parliament. He was told in the month of September, that it was a temporary erection only. Would it then have been correct on his part, or right in him immediately to have commenced litigation on the subject? or rather, was it not a proof of his moderation, and desire to accommodate the Company, when he acquiesced in what he was led to consider a mere temporary violation of his rights, in the expectation that it would only last for a short time? The first time, as far as I can understand from the evidence, that the Company claimed a right under the Act of Parliament to do the acts, was by a letter on the 30th of December, and in a month from that time the plaintiff filed his bill. I cannot imagine how it is supposed that this is to be considered such an acquiescence as to deprive him of all right whatever, or to give the defendants any right they would not have had, if such acquiescence had not taken place. They have not given evidence to show that they have incurred any expense on the faith of the plaintiff's acquiescence, and I am of opinion, therefore, \*that there is no acquiescence to deprive the plaintiff of any right to which he was entitled.

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

[ \*239 ]

The next point for consideration does certainly appear to me to be a very material one, that is, what are the inconveniences to which the parties would be subject by the granting of an injunction? It is, to a certain extent, discretionary with the Court whether it will, on interlocutory application, grant this extraordinary remedy; and with regard to that, the length of time that has elapsed is not immaterial. The inconveniences to which the Company may be subject, are, I must say, looking at these affidavits, stated in a manner which is extremely unsatisfactory. It has been argued strenuously, that if this injunction be granted, the consequence will be, that the line of railway cannot be safely used: that the safety of the persons who may travel on it will be endangered; and that by stopping the traffic on other parts of the railway, the public will be greatly inconvenienced. On this point I wish to state, that if I felt satisfied that there was that great

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

inconvenience, then looking on the other hand to the nature of the inconvenience suffered by Mr. Gordon and his willingness to accommodate, and the amount of inconvenience on the other side so strongly urged in argument, but in evidence so weakly supported, I ought rather to abstain from granting this injunction until this matter had been further investigated.

And this brings me to the last point in this case, which is, whether there ought to be any proceeding at law, either before the injunction is granted, or directed as a condition on which the injunction is granted. The Court has regard to the circumstances of each case. Sometimes it finds it most conducive to the justice of the case to grant an injunction at once, \*putting the party who has obtained it on terms to bring an action to support his right which has appeared to a court of equity so strong that it has acted on it, though at the same time, it wished to have it corroborated by the decision of a court of law; sometimes, from the great inconvenience, and at other times from the extreme doubt, it has considered it would be best, on the whole, that the injunction should be suspended till the right at law has been determined. These are courses which the Court takes, but I have some little doubt whether I am now in possession of all the evidence that is material for the purpose of determining this case. At any rate before I decide that point, which is the only one, I think I ought carefully to read the cases decided by Lord COTTENHAM. I do not think that I shall be doing any injury to the plaintiff if I suspend this for a few days. I shall reserve my judgment, and give it on Monday morning. At the same time I think I shall not be doing any wrong by allowing the defendants to inform me, much more accurately than they have done, what would be the consequences of stopping this by injunction.

Feb. 21.

The MASTER OF THE ROLLS said, that he had read the affidavits, which showed that there were inconveniences on both sides, but that in this, as in all other cases of injunction to prevent the use of works devoted to the public, it became necessary to consider on which side the inconvenience would press most, until the ultimate determination of the question in the cause, either by means of an action at law or by carrying the case to the House of Lords. That he had looked anxiously to find if there was any prospect of a limit in time, in regard to the inconvenience complained of by the plaintiff, but he could find none, and this seemed to him to be

the \*strongest point against the defendants, and on the whole he was of opinion that the plaintiff was entitled to an injunction.

By arrangement between the parties, the operation of the injunction was suspended for a limited period, the defendants undertaking to appeal from the decision.

GORDON  
T.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.  
[ \*241 ]

NOTE.—The case came before the LORD CHANCELLOR, on appeal, in November, 1842, and he directed the opinion of a court of law to be obtained as to the construction of the Act of Parliament. A further report of this case will be found in 2 Rail. Cas. 800.

### GRIFFITHS v. EVAN.

(5 Beav. 241—245; S. C. 11 L. J. Ch. 219.)

1842.  
March 19, 23.

A. devised to B. an estate during the life of herself and her husband, and after their deceases to the lawful issue of B.'s body for ever. Held that B. took an estate tail.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 241 ]

A. devised to B. in tail, and for want of issue of her body "he empowered and authorized" her to settle and dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family." B. appointed to her husband for life, with remainders over: Held that B. had a power of appointing to the "nearest family" only, that nearest family must be construed "heir," and that consequently the appointment to the husband was void.

THE testator in this cause, by his will dated in 1786, devised two freehold estates, of which, subject to a mortgage, he was seised, unto his eldest daughter Mary Evan, the wife of Stephen Evan, to hold to her, in terms expressed as follows: *i.e.* "for and during the term of her natural life and the life of her husband Stephen Evan, and from and after their several deceases, to the use and behoof of the lawful issue of the body of the said Mary Evan for ever; and for want of such issue, I do hereby empower and authorize her my said daughter Mary Evan to settle and dispose of my said estate, to such person or persons as she shall \*think fit, in and by one instrument in writing, being her last will and testament legally executed and attested by three credible witnesses, confiding in her my said daughter, that she will not, by the said instrument, alienate or transfer my said estate from my nearest family; subject nevertheless, and I do hereby charge my said estate to the payment of the mortgage already contracted and entered on by one David William."

[ \*242 ]

The testator then charged the estates with certain sums for his three younger daughters, and proceeded in the following terms: "And I do further recommend my said three daughters, Rachel,

GRIFFITHS  
F.  
EVAN.

Hannah, and Hesther, to the tender care and protection of my said daughter and devisee Mary Evan, fatherly advising her to make every further and additional provision for them in her power, as far as her circumstances will afford, on account that I have made this distinction, and preferred her to a higher station in the enjoyment of my both real and personal estate."

After the testator's death Stephen Evan paid off the mortgage, and got a conveyance to a trustee.

Mary Evan made her will in 1814, and thereby she devised the estate in question, and all other her real estate to her husband for life, with remainder to David Evan (his son by a former marriage, who was the great nephew of the testator, being the grandson of the testator's sister), to hold to him and his lawful issue for ever, &c.

Mary Evan died in 1828, without having had issue, and without having suffered a recovery, and her husband entered into possession.

[ 243 ]

Stephen Evan died in 1838, and David Evan, the sole defendant, entered into possession.

The bill was filed by the co-heirs of the testator, being the testator's younger daughter, and the children and a grandchild of the other two daughters, who were dead, against David Evan. It prayed that the defendant might let the plaintiffs into peaceable possession of the property, and deliver up the title deeds, and for an account of the rents, &c. from the death of Mary Evan, and that what might be found due might be set off against the defendant's lien, &c.

*Mr. Pemberton and Mr. Jenkins*, for the plaintiffs:

The gift is to Mary Evan for the joint lives of herself and her husband, with remainder to her lawful issue; consequently, under the rule in *Shelley's* case, the estate to herself and that to her issue coalesced, and on the whole she took an estate tail in the property, and this she has never barred: *Douglas v. Congreve* (1).

The power either enabled her to appoint to the testator's "nearest relations" alone, or the word "confiding" created an imperative trust on her not to "alienate or transfer" the estate from the testator's "nearest relations." In the former case she has not executed the power, and the property passes, in default of appointment, to the testator's heir. In the latter case there is a trust for the heirs as "nearest relations:" *Knight v. Knight* (2); for the word "family," when applied to real estate, means heir: *Wright v. Atkyns* (3).

(1) 49 R. R. 290 (1 Beav. 59).

(2) 52 R. R. 74 (3 Beav. 148).

(3) 13 R. R. 199; 24 R. R. 3 (19 Ves. 299; T. & R. 143).

*Mr. Kindersley* and *Mr. Evans*, for the defendant, contended, that the estate devised to the issue, and the estate *pur autre vie*, did not coalesce. “Assise per Lodington, quesi home done terre al A. B. pur terme dauter vye, le remaynder al heires de son corps engendres, onclore il nad que a terme dauter vye, durant le vye cesty que vye, tamen dicitur quod non est lex”(1) ; and that Mary Evan had, therefore, an estate for her own and her husband's life, and a power of devising to her husband for life.

Secondly, that the power limited to her, was to “dispose” of the estate “to such person as she should think fit,” which was a general power, and that she had executed it by her will, in favour of her husband and the defendant.

Thirdly, that the expression “nearest family” rendered the trust, if any, void for uncertainty: *Doe v. Joinville* (2), *Harland v. Trigg* (3). \* \* \*

The MASTER OF THE ROLLS held, that Mary Evan took an estate tail, with a power of appointing to the testator's “nearest relations,” which expression was, in this case, equivalent to heir. That the appointment was in equity void, and that the plaintiffs were therefore entitled as from the death of Mary Evan. An inquiry \*was directed of what was due on the mortgage, on account of the principal and interest, and on the other hand, the usual account of the rents as against a mortgagee in possession was ordered; and upon payment of the balance, a conveyance of the estate was directed to be made. No costs were given on either side.

GRIFFITHS

f.  
EVAN.

[ 244 ]

[ \*245 ]

## GLENGALL v. BARNARD.

(5 Beav. 245—246.)

1842.

March 23.

Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities and policies on the lives for securing the principal money. The Court seeing it for the benefit of all parties, refrained from ordering a sale, but directed the policies to be kept up, so as to secure the principal, and that the surplus annuities should be paid to the tenant for life.

Rolls Court.

LORD  
LANGDALE,  
M.R.

[ 245 ]

THIS was a suit for the administration of the estate of Mr. Mellish. It appeared that, on the marriage of one of his daughters, he had settled considerable property, and had given

(1) Brooks's Abr. Estates, 296.

(3) 1 Br. C. C. 142.

(2) 6 R. R. 585 (3 East, 172).

GLENGALL  
v.  
BARNARD.

a life estate therein to the husband. The husband had parted with his whole life interest by charging annuities thereon.

The testator bought up the annuities, and kept up policies on the husband's life, whereby the principal money was secured. The annuities and policies formed part of the testator's estate, which he had by his will settled on his daughters and on their issue in remainder.

The trustees, under the circumstances, were of opinion that it would be more beneficial to all parties to retain the annuities and keep up the policies, than to sell and invest the produce.

[ \*246 ]

*Mr. Pemberton* admitted, that the strict rule would be to sell the annuities and policies, and after investing the produce, to pay the dividends to the tenants \*for life, but argued that, as those securities would realise much less than would be ultimately secured by the policies, it would be for the benefit both of the tenants for life and those in remainder, that they should be retained, and that the amount of the annuities, after payment of the premiums, should be paid to the tenants for life.

The will, he said, contained a discretionary clause, enabling the trustees to sell as they deemed advisable.

*Mr. Kindersley*, *Mr. Bacon*, *Mr. Teed*, and *Mr. Koe*, for different parties.

The MASTER OF THE ROLLS said, that under the circumstances, he thought the arrangement beneficial, care being taken to keep up the policies, and that the decree must be prefaced with a declaration, that this course appeared to the Court beneficial for all parties.

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## LUCENA v. LUCENA.

(5 Beav. 249—250.)

1842.  
April 26.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 249 ]

A testator gave his widow a power of appointment amongst his children over a fund, which, in default of appointment, was given between them, but the shares of daughters to be for their separate use for life, with remainder to their children. The widow, by a will not executed with the formalities required by the power, gave the fund to the children equally. The Court supplied the formalities.

THE testator gave a sum of 24,000*l.* to trustees for his widow for life, with power to her of appointing 12,000*l.*, part thereof, amongst his children, by will attested by two witnesses, and in

default of appointment to fall into the residue. He gave the residue between his children, but as to his daughters, for their separate use for life, with remainder to their children.

LUCENA  
<sup>r.</sup>  
 LUCENA.

The widow, by a will which was not attested, appointed the 12,000*l.* between her sons and daughters equally; and the question was, whether this Court would aid the defective execution.

*Mr. G. Turner* and *Mr. Bloxam* argued that there was no case in which this Court would aid the defective execution of a power in favour of children, where their right would not be wholly defeated by the non-execution of the power; and here the children would take in default of appointment, with the advantage that the shares of the daughters would be for their separate use.

[ 250 ]

*Mr. Kindersley* and *Mr. Collins* contended that the Court would supply the defective execution of the power in favour of the children.

*Mr. Tinney*, *Mr. Taylor*, and *Mr. Freeling*, in the same interest.

The MASTER OF THE ROLLS held that the formality was to be supplied, and that the daughters took absolute interests in their shares.

## SIDEBOTHAM *v.* BARRINGTON.

(5 Beav. 261—263.)

1842.  
 June 8.

[A NOTE of this decision will be found at the end of the report of some earlier proceedings in the suit in 52 R. R. 212; see p. 215.]

[ 261 ]

## AGABEG *v.* HARTWELL.

(5 Beav. 271—273.)

1842.  
 June 28.

By the decree the costs of all parties were ordered to be taxed as between solicitor and client. Upon a rehearing the decree was affirmed, and the deposit was ordered to be returned, but nothing was said as to costs. By a subsequent order the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation. Held, that this did not include the costs of the rehearing.

*Rolls Court.*

Lord  
 LANGDALE,  
 M.R.

[ 271 ]

The costs of rehearings are not carried by the words "costs of suit as between solicitor and client," but they require to be specially mentioned in the order for taxation.

*Semble.* The same rule applies to the costs of appeals, and exceptions.

THIS case came before the Court upon petition under the following circumstances:

On the 6th of August, 1832, upon petition for payment of a sum



GLENGALL  
v.  
BARNARD.

a life estate therein to the husband. The husband had parted with his whole life interest by charging annuities thereon.

The testator bought up the annuities, and kept up policies on the husband's life, whereby the principal money was secured. The annuities and policies formed part of the testator's estate, which he had by his will settled on his daughters and on their issue in remainder.

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Rolls Court.  
 Lord  
 LANGDALE,  
 M.R.

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*Semble.* The same rule applies to the costs of appeals, and exceptions.

THIS case came before the Court upon petition under the following circumstances:

On the 6th of August, 1832, upon petition for payment of a sum

GRIEVESON  
v.  
KIRSOPP.

Mary his wife of the second part, a trustee of the third part, and Dodd and wife of the fourth part, reciting the death of four out of the six of the testator's children without issue, and either intestate or infants; and reciting the death of Mrs. Grieveson (another of the six children), leaving Sarah Carr Grieveson an infant, "in whom, together with Mary Kirsopp, the real estate of the said testator was then vested in coparcenary," subject to a mortgage and to such interest as Sarah Carr had therein; and also reciting that Dodd and Mabel his wife had, at the request of the said Sarah Carr, the widow, and the said John Kirsopp and Mary his wife, agreed to lend them the sum of 1,000*l.* to pay off the debt due from John Kirsopp to Sarah Carr, upon having that sum and the 200*l.* due on bond secured on mortgage of the undivided moieties, hereditaments, and premises, as thereafter mentioned; it was witnessed, that, in consideration of 1,000*l.* paid to Sarah Carr by Dodd and wife, and the 200*l.* due, Sarah Carr did grant, &c. and convey, and John Kirsopp and wife did grant, &c. and confirm unto the trustee and his heirs, all that one undivided moiety or half part of them the said John Kirsopp and Mary his wife, in right of the said Mary, and of and in the said estate and premises called Staley therein particularly described, and the allotments thereto, and also of and in all other messuages, lands, tenements, and hereditaments whatsoever, late of him the said John Carr the testator in the parish of Staley aforesaid, and all the estate, right, title, interest, possession, property, claim, and demand whatsoever of them the said Sarah Carr and John Kirsopp and Mary his wife, or any or either of them, of, in, or to the said undivided moieties, hereditaments, and premises, and \*every part and parcel thereof, in trust for Dodd and his wife, subject to redemption. There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption on payment of 1,200*l.* and interest to Dodd and his wife, by Kirsopp and his wife; and on payment there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage, and subject to the interest of Sarah Carr; and Kirsopp personally covenanted to pay the mortgage money.

[ \*285 ]

In 1824, a fine was levied pursuant to the covenant.

Long after the date of the deed, it was ascertained (1) that the property belonged to the widow for life, with remainder (as personal

estate) in fifth shares between Mrs. Kirsopp the surviving child, and the representatives of the four deceased children.

GRIEVESON  
r.  
KIRSOPP.

Mrs. Carr, the widow, as representing her deceased children, became entitled to one sixth part of the produce of the estate. She died in 1829.

Under these circumstances a question arose, as to the extent to which the interest of Mrs. Carr, the widow, was affected by the deed of 1819.

*Mr. Purvis* contended, that the deed and fine operated on the whole of the widow's interest in the moiety of the property.

*Mr. Pemberton*, *contrà*, contended that the effect of the deed and fine was, to make merely the widow's interest \*in the share which Kirsopp and wife actually conveyed, viz. one fifth, liable to the mortgage.

[ \*286 ]

#### THE MASTER OF THE ROLLS :

June 28.

At the date of the deed in question, viz. on the 31st of December, 1819, Mrs. Carr was entitled to the premises therein comprised for her life, and subject to her life interest, the property, as personal estate, belonged in fifth shares to her surviving child, and the personal representatives of her four deceased children. The rights of the children had not then been ascertained, and it was supposed, that, subject to the life interest of Mrs. Carr, the property belonged, as real estate, to Mrs. Kirsopp and the child of a deceased child, in coparcenary.

At the same time, a debt of 200*l.* was owing to Michael Dodd, as executor of Paul Vaillant, which was secured by the bond of Sarah Carr, Mary Kirsopp, John Grieveson, and Sarah Carr the younger; a debt of 1,000*l.* was also due from John Kirsopp to Sarah Carr, and the deed was executed, in consideration of the bond debt, and of 1,000*l.* paid to Sarah Carr. The conveyance was made to a trustee by Sarah Carr, and by John Kirsopp and Mary his wife, and the property, purported to be conveyed, was, all that undivided moiety of Kirsopp and his wife, in right of the wife, in the several premises therein described, and all the estate of Sarah Carr, and Kirsopp and his wife in the same moiety, in trust for Dodd and his wife, subject to redemption. There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption, on

GRIEVESON  
v.  
KIRSOPP.  
[ \*287 ]

payment of 1,200*l.* and interest to Dodd and his wife, by Kirsopp \*and his wife; and on payment, there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage and subject to the interest of Sarah Carr; and Kirsopp, personally, covenanted to pay the mortgage money.

Long after the date of the deed, it was ascertained that Mary Kirsopp, instead of being entitled, as heir, to a moiety of the estate, was entitled in her own right to only one fifth, as personal estate; and the question is, what, upon the construction and effect of the deed, is the effect of the conveyance executed by Mrs. Carr.

The estate being treated as personalty, Mrs. Carr became entitled to portions of the shares of her deceased children, who died intestate; and it is contended, that although Kirsopp and his wife, in her right, were only entitled to one fifth, subject to the life interest of Mrs. Carr, the conveyance by Mrs. Carr ought to extend to her own interest in an equal moiety of the whole. But, on perusal of the deed, I am of opinion that Mrs. Carr did not intend to convey, and that Dodd and his wife did not intend to receive from her, more than her interest in the share of the estate which was conveyed by Kirsopp and his wife; and I think, that the effect of the deed is not to pass more than her interest under the will, in so much of the estate as was conveyed by Kirsopp and his wife.

It being doubtful, upon the proceedings, whether Mrs. Carr the widow had joined in the fine, inquiry was made on the point, when it was ascertained that she was a party to it, and the case was then argued as to its operation.

[ 288 ]

*Mr. Purvis* contended that, as Mrs. Carr covenanted for herself and her heirs, her covenant was to be made good out of the lands (1). That a fine was a feoffment on record (2), and was conclusive evidence on production; and that Mrs. Carr was estopped from saying that the moiety did not pass (3).

*Mr. Pemberton, contra :*

The property is mere personalty, and the fine had no operation upon it. The security cannot extend beyond the intention of the parties to the deed; they were only dealing with the interests of Kirsopp and wife, and merely with such interest of the widow, as

(1) Co. Litt. 385 a.

(2) Shep. Touch. 5.

(3) Shep. Touch. 20.

she had in that portion of the property which belonged to Kirsopp and wife.

GRIEVESON  
v.  
KIRSOPP.

# THE MASTER OF THE ROLLS :

I stated my opinion, that the intention of the parties was to convey the widow's interest in so much of the estate as was conveyed by Kirsopp and wife. I do not think that the fine operates beyond the deed, and the intention of the parties appearing on the deed.

## BRISTOW v. BRISTOW.

(5 Beav. 289—293.)

1842,  
June 28, 29.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 289 ]

A testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, and gave a legacy of half the amount only, but without referring to the particular fund: Held, that the latter was a mere substitution for the former; and the particular fund failing, that the legatee was not entitled to be paid out of the general assets.

Dividends accruing on a specific bequest of stock before the same becomes transferable to the legatee pass with the stock.

\* \* UNDER the marriage settlement of Lady Bristow, a power was limited to her of appointing 5,000*l.* By her will she appointed a sum of 800*l.*, part of the 5,000*l.* to be equally divided between Mrs. Booth, her cousin, Mrs. Slater, and two other persons.

By a codicil she revoked the legacies given to Mrs. Booth, Mrs. Slater, and the other two persons, and proceeded thus: "I bequeath to each only 100*l.*"

It was decided in the case of *Bristow v. Boothby* (1), that the power of appointing the 5,000*l.* was void for remoteness; so that legacies given thereout failed. The Master to whom this cause was referred to take an account of the legacies, &c. reported the two of 100*l.* each given by the codicil to Mrs. Booth and Mrs. Slater amongst the general legacies; and to this part of his report, an exception was taken (2). \* \* \*

[ \*290 ]

The MASTER OF THE ROLLS held that the legacies of 100*l.* each were substituted for those of 200*l.* each, and were payable out of the same fund. He consequently allowed the exception.

The testatrix gave to a charity, called the Refuge for the Destitute, a sum of 1,700*l.* 4 per Cents., standing in the names of two trustees, which she directed "to be paid within twelve calendar months after her decease."

(1) 25 R. R. 248 (2 Sim. & St. 465). (4 Beav. 561), and the cases there

(2) See *Day v. Croft*, 55 R. R. 163 cited.

BRISTOW  
r.  
BRISTOW.

The stock had not been transferred, and two half-yearly dividends on the stock, amounting together to 68*l.*, had been received by the executors during the twelve months which elapsed after the testatrix's decease. These sums were claimed as part of the testatrix's general estate, on the ground that the executors were not, under the terms of the will, bound to transfer the stock until twelve months after her decease; and this point formed the subject of another exception to the Master's report.

[ \*291 ] The MASTER OF THE ROLLS, after hearing counsel in support of the exception, and without hearing the other \*side, overruled the exception, holding that the 68*l.* belonged to the legatees of the stock.

[The original report comprised other questions for decision which it is thought unnecessary to retain here.]

1842.  
June 30.  
*Rolls Court*  
Lord  
LANGDALE,  
M.R.  
[ 293 ]

### PERRY v. KNOTT (1).

(5 Beav. 293—297.)

The 32nd order of August, 1841, applied to a case of a breach of trust committed by several executors; and a cestui que trust might therefore, proceed against one in the absence of the others (2).

A suit may be maintained for a breach of trust in respect of an ascertained fund, by a party entitled to a moiety thereof, without making the person entitled to the other moiety a party.

THE testator, George Aldridge, gave and bequeathed unto his son Joseph Aldridge, his executors and administrators, the sum of 1,000*l.*, in trust for the separate use of Elizabeth, the wife of William Howell for life, and after her decease, equally amongst her children living at her decease. He appointed Deborah Aldridge, John Pricklow, Joseph Aldridge, and Edward Aldridge, his executors.

The testator died soon after, and his will was proved by his executrix and executors, who (according to the statement in the defendant's answer), shortly after the testator's death, transferred (out of the stock standing in the bank in the names of the executors and executrix), a sum of 3 per cent. Consolidated Bank Annuities, which, at the current price of such stock, at the date of such

(1) *Wilson v. Rhodes* (1877) 8 Ch. D. 777.

(2) This rule was afterwards replaced by Order VII. rule 2 of the Consolidated General Orders of 1860,

and see now Order XVI. rr. 6, 11 and 48, under which the present practice is regulated: *In re Harrison* [1891] 2 Ch. 349, 60 L. J. Ch. 287, 64 L. T. 442, and see *post*, p. 511.—O. A. S.

transfer, was worth 1,000*l.* sterling, into the joint names of Joseph Aldridge and Elizabeth Howell.

PERRY  
v.  
KNOTT.

Joseph Aldridge died in 1823, and Elizabeth Howell, who survived him, transferred the fund into her own name, and afterwards sold it out and applied it to her own use. Elizabeth Howell died in 1839, leaving two children, viz. the plaintiff Mrs. Perry, and William Howell.

The bill was filed by Mr. and Mrs. Perry, against Mr. and Mrs. Knott (the latter being the legal personal representative of Joseph Aldridge), seeking to charge his estate with a breach of trust, in consequence of the loss of the 1,000*l.* which had improperly been placed under the control of Mrs. Howell.

[ 294 ]

The defendants, by their answer, insisted, "that if any breach of trust was committed; touching the said stock, the same was committed by Edward Aldridge, Deborah Aldridge, and John Pricklow; and that they, or their personal representatives, as well as the said William Howell and the personal representatives of Elizabeth Howell, were necessary parties to the suit."

When the cause came on for hearing, on the 25th of June, 1841, the MASTER OF THE ROLLS held, that the other executors of the testator, and the representatives of Mrs. Howell, were necessary parties; but no decision was made as to the necessity of making the representatives of William Howell parties. The cause was ordered to stand over for want of parties, with liberty to amend. The order had been drawn up, but had not been passed by the Registrar. In the meantime the General Orders of August, 1841, came into operation.

The 32nd order directs, "that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable" (1). The 51st order directs, "that the foregoing orders shall take effect as to all suits, whether now depending or \*hereafter commenced, on the last day of Michaelmas Term, 1841" (2).

[ \*295 ]

These orders having come into operation, the plaintiffs procured this cause to be set down to be reheard.

*Mr. Pemberton* and *Mr. Wood* for the plaintiffs, contended, that by the 32nd order of August, 1841, it was unnecessary to make



PERRY  
v.  
KNOTT.

the other persons guilty of the breach of trust, parties to this suit; and that the order was applicable to the present case; for, by the 51st order, the orders of August, 1841, were to take effect as to all suits then depending, and that this cause was so circumstanced.

That the object of the 32nd order was to relieve a party, having an independent claim against several persons, from the necessity of making them all parties to a suit.

As to the representatives of William Howell, who was entitled to the other moiety of the fund, being a necessary party, they again relied on *Smith v. Snow* (1) and *Hutchinson v. Townsend* (2).

*Mr. George Turner and Mr. Craig, contrà, for Mr. and Mrs. Knott, the personal representatives of Joseph Aldridge:*

[\*296]

The orders of August, 1841, were never intended to apply to a cause which had been heard and disposed of; and the 32nd order only applies to cases, where, by contract, a joint and several liability is created. Here the liability is not joint and several; a demand cannot be made against one of several executors: they must all be \*made parties, in order that the accounts, in which they are all interested, may be taken in their presence, and that they may have the benefit of a contribution, if the decree be ultimately worked out against one. How otherwise could accounts be finally taken in a creditor's or a legatee's suit? The suit is therefore still defective for want of parties, first, because the other executors of the testator who joined in the alleged breach of trust, or their representatives, are not before the Court; secondly, because the representative of Mrs. Howell, the person who really committed the breach of trust and received the money, is not a party; and, thirdly, because William Howell, or his representative, is not a party.

The case of *Smith v. Snow* has not been approved of; and it has always been admitted, that the principle of the decision in that case is not to be extended.

They also cited an unreported case of *Attorney-General v. Hughes* before Vice-Chancellor K. Bruce, in which the *Attorney-General* had filed an information against the surviving executor and the representatives of a deceased executor to obtain payment of legacy duty, without making the representatives of two deceased executors parties; and the COURT (they stated) held that the latter were necessary parties if any account were to be taken.

(1) 18 R. R. 186 (3 Madd. 10).

(2) 44 R. R. 311 (2 Keen, 675).

## THE MASTER OF THE ROLLS :

PERRY  
v.  
KNOTT.

I think that the 32nd general order applies to so much of this case as relates to the persons who are alleged to have jointly committed the breach of trust; in the case cited (1), there may have been peculiar circumstances to require the decision stated to have been there made.

As to the next point, I conceive this to be a distinct demand for a distinct aliquot part of a distinct sum, and upon the authority of *Smith v. Snow* I think that the representative of William Howell is not a necessary party to the suit.

[ 297 ]

As to the third objection, I think the executor of Mrs. Howell is a necessary party, because she reaped the benefit of the second breach of trust.

It was ultimately referred to the Master to inquire when, and by whom, and under what circumstances, the 1,350*l.* was sold out, and whether or not with the privity and assent of the plaintiff, and whether any part was applied for the benefit of the plaintiff with liberty to state special circumstances.

## HENDERSON v. CONSTABLE.

(5 Beav. 297—300; S. C. 11 L. J. Ch. 332.)

1842.  
June 30.Rolls Court.  
Lord  
LANGDALE,  
M.R.

[ 297 ]

A bequest was made of 2,500*l.* after the death of A., as A. should appoint, with a gift over “of the same” in default, and to be paid with interest from A.’s death. A. appointed a part to B., and 1,630*l.* to other persons, and directed the sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.’s decease. Held, that the interest on the 1,630*l.* accruing between the death of A. and B. neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment.

THE testator, John Henderson, bequeathed his personal estate to his executors, on trust to pay his wife an annuity of 100*l.* a year for life; and after her decease, to pay 2,500*l.* “to and among his children, or to the children of such of them as should be then dead,” as his wife should appoint; and for want of such appointment, or as to such parts whereof no such appointment should be made, upon trust to pay “the same” equally among his six children (naming them), “or to the survivors, or to the children of such of them as should be then dead leaving issue, such issue being \*entitled to their parent’s share thereof, and to be paid at the end

[ \*298 ]

(1) An unreported case of *A.-G. v. Hughes*.

HENDERSON of twelve calendar months after her decease, with interest for the same from the time of his wife's decease."

<sup>c.</sup>  
CONSTABLE.

The widow, by her will, after reciting her power, proceeded thus: now "I Sarah Henderson, in pursuance of the said power, &c., do appoint the said sum of 2,500*l.* as follows:" she then appointed 1,630*l.* only amongst certain objects of the power, and a further sum of 670*l.* to her son William Henderson, and she proceeded in the following words: "the said legacies or sums to be paid at the decease of my son William, except the one left to himself, to be payable at my decease."

The widow died in October, 1834, and William Henderson was still living.

The only question arose as to the interest which might accrue on the 1,630*l.* between the death of the widow and the death of her son William; the widow having made that sum payable with interest from the death of her son William.

It was contended, first, that the interest must go to the parties entitled in default of appointment: [*Wilson v. Piggott* (1)].

[ 299 ]

Secondly, it was contended by the appointees of the 1,630*l.*, that the whole interest passed to them with the principal money as an incident thereto.

Thirdly, it was contended on behalf of William Henderson, that there was an implied gift to him of the intermediate interest: *Roe v. Summerset* (2); in which case, there was a gift to A. after the death of B., and it was held that B. took a life estate by implication.

Lastly, it was contended, on behalf of the residuary legatee, that as there was no appointment of the interest in question, and as the gift over in the testator's will was of "the same," viz., the capital, and not of the interest, the residuary legatee was entitled to the benefit of its non-appointment.

*Mr. Kindersley* and *Mr. Elderton*, for the plaintiff.

*Mr. Faber*, *Mr. S. Atkinson*, *Mr. C. Barber*, *Mr. Wray*, and *Mr. Phillips*, for several parties.

*Mr. Kindersley*, in reply.

THE MASTER OF THE ROLLS:

From the terms of the testator's will, I infer that the subject of the appointment, and of the gift in default of appointment, is the

(1) 2 R. R. 246 (2 Ves. Jr. 351).

(2) 5 Burr. 2608.

same; namely, the principal sum of 2,500*l.* with interest from the wife's death.

HENDERSON  
v.  
CONSTABLE.

The widow has appointed 2,300*l.* only, and the interest on part of it, viz., on 1,680*l.* from the death of her son William. I think that those who take under the \*power can only take the sums appointed by her. William, therefore, takes 670*l.* immediately; and the other appointees have the time for payment of these legacies postponed until the death of William, and are entitled to interest only from that period.

[ \*300 ]

I cannot follow the argument that there is a gift to William Henderson by implication; I see no foundation for any such inference: there is a gift to persons in default of appointment, and there must be a distinct appointment in order to defeat the gift over.

The interest, which is part of the subject of appointment and of the gift over not being appointed, must go as in default of appointment; and the parties taking in default of appointment are therefore entitled to the interest accruing between the death of the widow and the death of her son William.

### KENDALL v. GRANGER (1).

(5 Beav. 300—304; S. C. 11 L. J. Ch. 405; 6 Jur. 919.)

A bequest of personalty to trustees, to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility." Held, void as a charitable bequest.

1842.  
July 2.

Rolls Court.  
Lord  
LANGDALE,  
M.R.

[ 300 ]

THE question in this cause was as to the validity of a charitable bequest.

The testator William Kendall, after giving certain legacies, proceeded as follows: "All the rest and residue of my goods, chattels, testamentary estate, and effects and property real and personal (according to their respective natures and quality, including trust estates), I give, devise and bequeath to the above named Frederic Granger and John Squance, their heirs, executors, administrators, and assigns, upon trust, with all reasonable expedition, to sell and dispose thereof, as \*follows: after converting the whole into money, to divide the produce, and pay to each of the daughters of my brother lately deceased, who have arrived at the age of twenty-one years, and those now minors when they

[ \*301 ]

KENDALL  
v.  
GRANGER.

attain that age, 400*l*. The remaining surplus monies, I will and direct, shall be at the disposal of the said Frederic Granger and John Squance, to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever. Provided only, that should any difference or differences of opinion occur as to the application or distribution of any part of such surplus; then I direct, that such differences, as they may arise, shall be submitted by my trustees to the judgment of the above named Edmund Pollexfen Bastard, and that his decision shall be binding and conclusive on the subject in controversy. It is farther my express wish and intention, that, if practicable, the whole of such surplus monies be distributed and disposed of within three years after my decease."

He appointed Granger and Squance his executors.

The testator died in 1832, leaving both real estate and pure personalty of considerable value.

This bill was filed by his heir-at-law and next of kin, against the trustees, to have it declared that the alleged gift of the residue to charity was void.

The case came on for further directions, and the only question was, whether this was a valid charitable gift as regarded the pure personalty.

[ 302 ]

*Mr. Kindersley, Mr. Flather, and Mr. Terrell, for the plaintiffs.*

*Mr. Pemberton and Mr. Swinburne, for the defendants.*

*Mr. Wray, for the Attorney-General.*

They cited *Morice v. The Bishop of Durham* (1), *Williams v. Kershaw* (2), *Ellis v. Selby* (3), *James v. Allen* (4), [and other cases].

THE MASTER OF THE ROLLS :

The question arising upon this will is, whether the trustees are bound to apply the fund wholly to a charitable purpose, for, to make it valid, it must, according to the decisions, be obligatory on them. It is not a question whether the trustees may apply it to a charitable purpose, but whether, by the words of the will, they are bound

(1) 7 R. R. 232 (10 Ves. 522).

(3) 43 R. R. 188 (1 My. & Cr. 286).

(2) 42 R. R. 269 (5 Cl. & Fin.

(4) 17 R. R. 4 (3 Mer. 17).

111, n.).

to do so. The decisions go to this further extent, that they must have no option between a charitable and any other purpose.

KENDALL  
v.  
GRANGER.

This Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the statute of Elizabeth, or one of such purposes as the Court construes to be charitable, by analogy to those mentioned in that statute. The difficulties always arise from the vagueness of the language used by testators. There is no charitable purpose which is not a benevolent \*purpose, and yet, a trust to apply funds to a benevolent purpose has been held not to be a charitable trust, on the ground that there are benevolent purposes which the Court cannot construe to be charitable purposes; and the trustees, being directed to apply it to benevolent purposes, may apply it to benevolent purposes which are not charitable, according to that narrow construction. So it is also with the word "liberality," which is perhaps more vague, for persons may take very different views of what is or is not liberality. In this case the direction is to apply this fund "for the relief of domestic distress, assisting indigent but deserving individuals." I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose; for its object is to relieve distress by assisting indigent but deserving individuals, and that would be a valid charitable purpose because of the word "indigent;" but the testator goes on to say "or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever." Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own, that in my opinion, according to the decisions which have taken place in this Court, they are not. The words "general utility" are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust-fund from those purposes which this Court is in the habit of considering charitable.

[ \*303 ]

I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there

[ 304 ]

KENDALL  
v.  
GRANGER.

are older cases, showing perhaps that the Court would, in a case where charitable purposes were mentioned, have taken care that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose.

1842.  
July 22.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 304 ]

## RICHARDS v. COOPER.

(5 Beav. 304.)

A second mortgagee can sustain a bill of foreclosure against the mortgagor and subsequent mortgagees, without making the first mortgagee a party.

THE plaintiff, who was the second mortgagee of some property, filed his bill of foreclosure against the assignees of the mortgagor, and the mortgagees subsequent to himself, but without making the first mortgagee a party.

*Mr. Pemberton and Mr. W. James, for the plaintiff.*

*Mr. Bagshawe, for Wood, the fourth mortgagee, objected, that the first mortgagee ought to have been made a party to the suit, for his client was desirous of redeeming, and ought to have the opportunity of redeeming all parties without the necessity of commencing another suit against the first mortgagee.*

The MASTER OF THE ROLLS overruled the objection, and made the ordinary decree for foreclosure.

1842.  
July 14, 21.  
Nov. 15.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 307 ]

## THE ATTORNEY-GENERAL v. THE CORPORATION OF NEWCASTLE.

(5 Beav. 307—318; S. C. 6 Jur. 789.)

[THIS case is reported on appeal to the House of Lords in 12 Cl. & Fin. 402, to be contained in a later volume of the Revised Reports.]

KELLAWAY *v.* JOHNSON.

(5 Beav. 319—325; S. C. 6 Jur. 751.)

1842.  
July 22.*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 319 ]

Consols were settled to the separate use of the wife for life, with a power to appoint it by will, and the settlement contained a power for the trustees, with the consent in writing of the wife, to alter the securities. The trustees, without such consent, sold the Consols, and invested the produce in Long Annuities, which they afterwards sold and lent the money on bond, which was afterwards received by the husband, who invested it in leaseholds. The wife received the Long Annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the Long Annuities and the subsequent investments had been with her consent. Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the Consols replaced, and that the interest over which the wife had a general power of appointment was not liable to make good the breach of trust.

Since the orders of August, 1841, it is not necessary to make all the persons committing a breach of trust parties to a suit for its restitution.

By the settlement, made on the marriage of Mr. and Mrs. Letts in 1797, a sum of 3,000*l.* Consols was vested in trustees, upon trust for Mrs. Letts for her separate use for life, with remainder to her husband for life, with remainder to the children of the marriage, and if there should be none (which event happened), in trust, as to one half for such persons as Mrs. Letts should by will appoint, and in default for her next of kin.

The settlement contained a power for the trustees, with the consent of Mr. and Mrs. Letts, and the survivor, testified in writing under their hands or hand, to sell the Consols, and invest the produce "upon any other public, or on real security or securities with interest, or in the public stocks or funds, or in the purchase of freehold or copyhold hereditaments;" and from time to time, with such consent and approbation, to alter and transpose the same, and to sell and dispose of the hereditaments so to be purchased; and such hereditaments were to be considered as money, and personal estate.

In 1799 the four trustees sold out the Consols, and the produce, amounting to the sum of 2,040*l.*, was invested in the purchase of 102*l.* Long Annuities.

In February, 1801, the Long Annuities were sold by the trustees, and the produce, amounting to 1,760*l.* 15*s.*, was lent on bond. The bond was afterwards paid, and the amount was received by Mr. Letts.

[ 320 ]

The dividends on the 3,000*l.* and the Long Annuities, until sold, were received by Mrs. Letts; but no other part of the income, so far as appeared by the evidence, had been received by her.



KELLAWAY  
r.  
JOHNSON.

By an indenture, dated in September, 1801, and executed by and made between Thomas Letts and Esther his wife of the one part, and two of the trustees of the other part, after reciting the sale by the four trustees of the said Long Annuities, at the request and by the consent and approbation of Mr. and Mrs. Letts (testified by their signing and executing that deed), and the placing out the produce thereof, with the like consent and approbation on such bond as aforesaid, and that the said Thomas Letts had received nearly the whole of the monies thereby received, and was desirous of placing out the same in the purchase of leasehold premises, or other personal security to the best advantage he could, and after reciting that he had, with 1,250*l.*, purchased certain leaseholds, Mr. Letts thereby acknowledged the 1,250*l.* was the produce of the trust monies, and that he would, at the request of his wife or the trustees, assign the leaseholds to the trustees; and he covenanted with the trustees that it should be lawful for his wife to receive the rents for her life.

Mrs. Letts died in 1818, without having had any child, having, by her will, appointed her moiety in trust to divide amongst her nephews and nieces, in her will named, including therein the plaintiff Mrs. Kellaway.

[ 321 ]

Mr. Letts died in 1834.

This bill was filed in 1835, by Mr. and Mrs. Kellaway, the limited personal representatives of Mrs. Letts, and claiming under her will, against the representatives of Mr. Letts, the representatives of three out of the four trustees, and the other appointees under the will of Mrs. Letts, seeking to charge the estate of Mr. Letts and the estates of the three trustees with a breach of trust in investing the trust funds in the manner above stated.

*Mr. Pemberton* and *Mr. Dixon* contended that the representatives both of Mr. Letts, and of the three trustees, were bound to replace the moiety of the 3,000*l.* Consols improperly sold out, and invested in funds not warranted by the settlement; and also to pay the amount of the dividends accrued since the death of Mr. Letts, and the costs of the suit. They insisted also that the plaintiffs were entitled to have a lien on the leasehold estate for the amount.

*Mr. Kindersley*, *Mr. Cooke*, *Mr. Koe*, *Mr. Ellison*, *Mr. Lloyd*, *Mr. Paynter*, and *Mr. Lorat* for parties in the same interest, and

*Mr. George Turner, Mr. Lewis, Mr. Purvis, Mr. Faber, Mr. Tinney, and Mr. Bacon* for the representatives of Letts, and of the three trustees, argued as follows :

KELLAWAY  
f.  
JOHNSON.

Mrs. Letts concurred in the selling out of the trust fund, and she had the benefit of it, by receiving the Long Annuities. She afterwards executed a deed detailing the transactions, acknowledging that they had taken place with her consent and approbation, and therefore confirming them. She is to be treated as a *feme sole*, in regard to this property, and having concurred, her \*whole interest is liable to indemnify the defendants. \* \* \*

[ \*322 ]

The property was settled for her separate use, without any restriction against anticipation, which was not the case in *Hockley v. Bantock* (1); and having a general power of appointment, the fund in the hands of her appointees, who are mere volunteers, is subject to her debts and liabilities (2) : *Heatley v. Thomas* (3). \* \* \*

Lastly, no relief can be had on this record, as there is no representative before the Court of Mr. Fixen, one of the trustees, guilty of the breach of trust.

[ 323 ]

*Mr. Pemberton*, in reply :

The trustees had no right to sell out the stock except in the manner authorised by the power, viz. upon an authority in writing. The sale took place without the written authority of the wife, and for an improper purpose, and the acts of concurrence relied on are not binding on a married woman (4).

The 32nd order of August, 1841, renders it unnecessary to make all the trustees parties (5).

#### THE MASTER OF THE ROLLS :

This is a bill filed to make good a breach of trust under the following circumstances. On the marriage of Mr. and Mrs. Letts a settlement was made of a sum of 3,000*l.* Consols, the dividends of which were to be paid to the wife for life for her separate use, with remainder to Mr. Letts, with remainder to the children of the marriage, and if no children, one half of the principal was to go to the husband, and the other half to such persons as the wife should appoint by will, and there was a gift over in default of appointment.

(1) 25 R. R. 16 (1 Russ. 141).

(4) See *Hopkins v. Myall*, 34 R. R.

(2) See *Jenney v. Andrews*, 23 R. R. 25 (2 Russ. & My. 86).

216 (6 Madd. 264).

(5) See *Perry v. Knott*, *ante*, p. 502.

(3) 10 R. R. 122 (15 Ves. 596).

KELLAWAY

JOHNSON.

[ \*324 ]

here was a power for the trustees, with the consent in writing of the husband and wife, to sell the stock, and invest the produce on public or real securities, or securities at interest, or in the public \*stocks or funds, or in the purchase of freehold or copyhold hereditaments. The stock was sold out, not for any of the purposes mentioned in the settlement, but for the purpose of applying it in the purchase of 102*l.* Long Annuities. In February, 1801, these Long Annuities were sold for 1,760*l.* 15*s.* This money, instead of being invested in any of the securities pointed out, was lent on bond; and the bond was afterwards paid off, and Mr. Letts, who received the money, applied it in the purchase of a leasehold estate.

A more clear breach of trust was never committed. The wife afterwards executed the deed of 1801, which did not bind her, because she was induced by the husband, who had the benefit of the breach of trust, to execute this deed. The wife by her will executed the power, and the plaintiffs are entitled under the will. She died in 1818, having had no children and she left her husband surviving. He died on the 26th of February, 1834, and his executors are the first named defendants on this record. The question is, if the representatives of Mr. Letts and the trustees who concurred are not answerable; and it is clear that the trustees are answerable, together with the representatives of Mr. Letts, who had the benefit of the breach of trust. If the stock had not been improperly sold out for an improper purpose, there would have been no loss or diminution of the trust fund. All the trustees were parties to it; all the trustees concurred in selling the Long Annuities; and each and every of them is answerable for any future loss, the root and cause of such loss being the original selling out of the stock. The estates of the trustees, therefore, are all liable; the stock must be replaced with the dividends since the death of Letts. The leasehold estate, in the purchase of which the trust fund was invested, still exists, and the plaintiffs have a right to make it available to satisfy the breach of trust.

[ 325 ]

I think it is not necessary to have all the persons liable before the Court; for under the new orders, if one trustee only was present, I should make a decree against him, leaving him to seek contribution from the other trustees (1).

It was declared that the estates of Letts and of the trustees were liable to replace one moiety of the 3,000*l.* Consols, and to make

(1) See note, p. 502, *ante*.

good the dividends accrued since the death of Mr. Letts, and to pay the costs of the suit; and it was declared that the leasehold estate and the rents received since the death of Mr. Letts, were specifically liable to the claim of the appointees of Mrs. Letts.

KELLAWAY  
F.  
JOHNSON.

## WILLIAMS v. WENTWORTH (1).

(5 Beav. 325—329.)

1842.  
July 20, 21.  
Aug. 1.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

[ 325 ]

The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, for monies expended for the necessary protection of his person and estate.

Under a commission of lunacy, A. B. was, upon inquisition, found lunatic, and the verdict was confirmed upon the trial of a traverse. Before the costs had been ordered to be raised A. B. died: Held, that under the 3 & 4 Will. IV. c. 104, the real estate of the lunatic was liable for the costs of the proceedings.

In this case, the plaintiff, representing himself to be a creditor of Charles Henry Tubb deceased, filed his bill, on behalf of himself and all other the creditors of the same person, to obtain payment of his and the other debts out of the real and personal estate of the debtor. The heir-at-law put in a demurrer to the bill, and alleged that upon the bill it did not appear that the plaintiff was a creditor.

The case was this: Charles Henry Tubb was a lunatic; the plaintiff petitioned for a commission of lunacy, which was duly issued. Upon the inquisition, a verdict of lunacy was obtained, and upon the trial of a traverse, \*was confirmed. By an order of the LORD CHANCELLOR, it was referred to the Master to tax the costs: to inquire what fund there was for payment, and if no fund, whether it would be proper to raise the amount by sale or mortgage of the real estate. Pending the proceedings before the Master, the lunatic died; and the LORD CHANCELLOR, acting under his jurisdiction in lunacy, had no longer power to raise the costs by sale or mortgage of the lunatic's estate, but under an order afterwards made, the costs were taxed at the sum of 1,168*l.* 16*s.* 8*d.* The Master's report was confirmed, and by an order, made by the LORD CHANCELLOR "in the matter of the lunacy," it was declared that the costs had been properly incurred for the benefit of the lunatic, and the bill also alleged, that they were necessary for the protection of the person and estate of the lunatic.

[ \*326 ]

(1) *In re Rhodes* (1889) 44 Ch. Div. 94, 59 L. J. Ch. 298, 62 L. T. 342.

WILLIAMS  
v.  
WENT-  
WORTH.

*Mr. Kindersley and Mr. Dixon, for the heir-at-law, in support of the demurrer :*

The plaintiff has no valid demand as against the real estate of the lunatic. He must rest his claim on the 3 & 4 Will. IV. c. 104, which makes the real estate of persons “assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty.” This is not a debt on specialty: if it were, it would be plainly invalid, being created by a lunatic; is it then a debt on simple contract? Now this claim is not in the ordinary use of the term a “debt” at all; nor is it possible that any contract could be entered into between the lunatic and the plaintiff. It would be extraordinary indeed, if a stranger by his voluntary interference could charge the heir. [They cited *Carter v. Beard* (1).]

[ 327 ] Upon the death of the lunatic, the LORD CHANCELLOR had no longer the power to charge the estate, which then became the estate of the heir, and was not the estate of the lunatic.

*Mr. Pemberton, Mr. G. Turner, and Mr. Willcock, in support of the bill :*

\* \* In *Howard v. Lord Digby* (2), Lord BROUGHAM considered a lunatic was as liable for money paid to his use for necessaries, &c., as a person of sound mind, for otherwise he might be left destitute. \* \* \*

[ 328 ] In *Carter v. Beard*, the VICE-CHANCELLOR OF ENGLAND conceived that the expenditure by the lunatic’s stepfather beyond the rents, for the maintenance of the lunatic, “was an act of bounty,” and that the funeral expenses were “not a debt contracted by the lunatic;” in fact, that they could not constitute a debt of the deceased party, as they were not due at his death.

The words “simple contract” comprise an implied contract as well as any other.

The personal estate of the lunatic would formerly have been liable to this demand, and now, by the statute, the real estate is equally liable. \* \* \*

[ 329 ] *Mr. Kindersley, in reply.*

THE MASTER OF THE ROLLS :

I will consider this case.

(1) 51 B. R. 204 (10 Sim. 7).

(2) 37 R. R. 276 (2 Cl. & Fin. 634).

## THE MASTER OF THE ROLLS :

WILLIAMS

WENT-  
WORTH.  
Aug. 1.

It was argued in this case, that however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but I am of opinion that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate, and that under the circumstances of this case, a debt was constituted, and that payment of it may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic, may well be subject to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to,—that a man shall not be allowed to stultify himself.

*Overrule the demurrer.*

## HOTHAM v. SOMERVILLE.

(5 Beav. 360—372; S. C. 6 Jur. 861.)

1842.  
July 9.  
Aug. 4.*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 360 ]

F. and W., as solicitors for the tenant for life, held the title deeds which afterwards passed into the possession of W. and C., their successors. The tenant for life died, and the estate then stood limited, first, to F. and W. for 500 years to secure a sum of 2,000*l.*, with remainder to trustees for 600 years to secure a jointure and portions, with remainder to A. B. in tail.

A. B. being an infant, a suit was instituted on his behalf, in which the 2,000*l.* was raised on the security of the term. Upon that occasion, F. and W. covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the Court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. and C. were solicitors in the suit for A. B.

A. B., upon coming of age, presented a petition for the delivery of the title deeds. Held, that (independently of the covenant) W. and C. held the deeds for A. B., and not for the termors, but the covenant having been entered into for the benefit of the infant, F. and W. were not bound to part with the deeds, until released from their covenant. Held also, that

HOTHAM  
v.  
SOMERVILLE.

W. was not entitled to hold the deeds for the trustees of the term of 600 years, or for any costs other than those of seeing himself properly released from the covenant, and that he had no right to require them to be delivered to the receiver in the cause.

THE circumstances of this case are fully detailed in the judgment of the COURT.

*Mr. Pemberton* and *Mr. Glasse*, for the petitioner William B. Hotham.

*Mr. Kindersley* and *Mr. Faber*, for other parties supported the petition.

*Mr. Bigg*, for Mr. Fulwer Craven.

*Mr. Tinney* and *Mr. Hallett*, for Mr. White, in opposition.

*Mr. Pemberton*, in reply.

#### THE MASTER OF THE ROLLS :

This petition prays that the respondent may deliver up certain deeds and documents to the solicitor of the petitioner.

In the year 1808, the estate to which the petitioner is entitled. was, under the authority of an Act of Parliament, purchased and conveyed to William Hotham of Bognor, William Hotham of York, and Jane Cowan, in \*fee, in trust for the then subsisting uses of the will of Sir Richard Hotham : viz., to the use of William Hotham of Bognor for life, with remainder to the use of the first son of the same William Hotham in tail, with other remainders over, and there was power, enabling the tenant for life to secure a jointure for his widow, and portions for his younger children.

On the occasion of this purchase, the title deeds of the estate were delivered to Messrs. White and Fownes, as the solicitors of William Hotham of Bognor, the tenant for life.

In the year 1809, William Hotham of Bognor, in pursuance of arrangements made on his marriage in 1807, executed deeds, whereby he granted an annuity, by way of jointure, to his wife, and charged the estate with portions for his younger children ; but the wife having died in October, 1810, leaving a daughter Jane Marianne, the only issue of the marriage, the deed ceased to have any operation.

Jane Cowan, one of the trustees named in the Act of Parliament, having died before the year 1819, Mr. Fownes, one of the solicitors

of William Hotham of Bognor, was appointed a trustee in her place, and deeds were executed in the month of February, 1819, whereby the estate, formerly vested in William Hotham of Bognor, William Hotham of York, and Jane Cowan was conveyed to William Hotham of Bognor, William Hotham of York, and James Somerville Fownes (1). HOTHAM  
v.  
SOMERVILLE

The deeds had passed from the possession of White and Fownes into the possession of Fownes and White, \*who had succeeded to their business, and were held by Fownes and White as the solicitors of William Hotham of Bognor. [ \*362 ]

William Hotham of Bognor was about to marry again ; previously to his doing so, and in order to make provision for his daughter and only child of his first marriage, and to provide a jointure for his intended wife, and portions for the younger children of his second marriage, he, by an indenture dated the 26th day of February, 1819, charged the estate with the sum of 2,000*l.*, as the portion of his daughter Jane Marianne ; and pursuant to his power, and for better securing the payment of the 2,000*l.*, he demised the estate to James Somerville Fownes and Richard Samuel White, for the term of 500 years, on trust to raise the 2,000*l.*, with a proviso for the cesser of the term when the trusts should be performed.

By this deed Messrs. Fownes and White, who were the solicitors of William Hotham of Bognor, and who held the deeds for him, became the trustees of the term of 500 years, for securing payment of the daughter's portion ; but the acceptance of the trust did not vary the custody, which remained, as before, in the hands of Fownes and White, as the solicitors of William Hotham of Bognor.

In pursuance of arrangements made on the second marriage of William Hotham of Bognor, a deed, dated the 20th of March, 1819, was prepared. It was not executed till some years afterwards, when circumstances had in some respects changed. The effect ultimately was to secure a jointure of 60*l.* a year to the second wife, and portions for the younger children of the second marriage ; and for these purposes, a term of 600 years was vested in Henry Usborne and Fulwer Craven, \*in trust to secure the jointure and the portions subject to prior charges. [ \*363 ]

Of the second marriage there were three children, the petitioner William Beaumont Hotham, Richard Henry a younger son, and Georgiana an only daughter ; and, under these circumstances, the estate, subject to a fee-farm rent, stood limited to William Hotham

(1) He afterwards took the name of Somerville.



HOTHAM  
v.  
SOMERVILLE.

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PATERSON    a necessary party, and could not properly be made a party, as he  
                   <sup>c.</sup>  
 LONG.        was not a party to the defendant's contract (1).

THE MASTER OF THE ROLLS :

If there is to be a specific performance of the contract, the purchaser of lot 2 will be bound to concur in the assignment, but is it necessary that he should be a party to all the litigation between the vendor and the purchaser of lot 1? I think not; besides this, the bill alleges that he is ready to concur. Although it might, by possibility, become necessary hereafter to compel him to join in the assignment, still, I see no reason for making him a party to a suit until that necessity arises.

*The demurrer must be overruled.*

1842.

Feb. 23.

*Rolls Court.*

Lord  
 LANGDALE,  
 M.R.

[ 188 ]

ALDRIDGE *v.* WESTBROOK.

PARSONS *v.* WESTBROOK.

(5 Beav. 188—193.)

A. being entitled to a moiety of an estate, covenanted to settle it on himself for life, with remainder to his wife and children. He afterwards purchased the other moiety from his brother B., and mortgaged the entirety to B. who, having no notice, obtained priority over the wife and children of A. By the will of B. the mortgage was given to his widow C. for life, with remainder to A. absolutely. A. died, and C., by virtue of the mortgage, received the rents of the entirety to the disappointment of the wife and children of A. C. afterwards died. Held, that the widow and children of A. had no equity as against the general creditors of A. to have a lien on the second moiety of the estate, to recoup the loss sustained by them by C.'s receiving the rents of the moiety of the estate bound by the settlement, from the death of A. to the death of C., but that they must come in as specialty creditors under the covenant.

A mortgagee filing a bill for the benefit of himself and the other creditors of the deceased, is entitled to payment of his mortgage money out of the mortgaged estate, before payment of the costs of suit.

THE second of these two suits was filed on behalf of the creditors of Richard Aldridge. The first suit was instituted by his children, to have the benefit of articles entered into by him on his marriage.

It appeared, that Richard Aldridge and his brother James Aldridge were equally entitled to an estate called Woodmacotes, which, in 1792, they mortgaged for 1,200*l.* to a Mr. Lee.

Richard Aldridge, being about to marry, executed articles of

(1) *Wood v. White*, 48 R. R. 152 (4 My. & Cr. 460).

settlement, whereby he covenanted, within three months, to convey his moiety of this estate to trustees, free from incumbrances, in trust for himself for life, with remainder to his wife for life, and with remainder to the children of the marriage.

ALDRIDGE  
v.  
WESTBROOK

In 1808, James Aldridge sold and conveyed his moiety of the estate to Richard, and on the 5th of October, 1808, Richard, in violation of the marriage articles, mortgaged the entirety of the estate to James for securing 1,000*l*.

In November, 1810, James died, having by his will given his real and personal estate to trustees, upon trust \*for his wife Anne for life, and after her death and subject, as to his personal estate, to some legacies, in trust as to the whole of his real and personal estate for his brother Richard Aldridge.

[ \*189 ]

On the death of James, Richard was indebted to him in the sum of 1,000*l*., secured by the mortgage, and in the further sum of 2,000*l*., for which he held no security. An arrangement was afterwards entered into, by means of which the trustees of James got in the first mortgage for 1,200*l*., and with it the legal estate, and Richard executed to them a mortgage of the entirety of the estate, for securing to them the sum of 4,200*l*., being the aggregate amount of the first mortgage of 1,200*l*., and the two sums of 1,000*l*. and 2,000*l*. due from Richard to the estate of James.

Neither James himself nor his trustees had any notice of the articles, and they were consequently unfettered thereby. The consequence was, that the widow of James, who was entitled to an estate for life in the mortgage for 4,200*l*. secured upon the entirety of the estate, had the benefit of this security from 1810 to her death, which had recently happened, and in respect thereof, she received during her life the whole amount of the rents of both moieties of the estate in question.

Richard died on the 5th of September, 1818, without having performed the covenant contained in the marriage articles. Upon his death his widow and children would, if Richard had duly performed the marriage articles and had not mortgaged the estate, have become entitled to the receipt of a moiety of the rents and profits of the estate; but from 1818 to the death of James's widow in 1841, their rights had been defeated by the paramount claims of the widow of James.

The mortgage for 4,200*l*., though valid as against the marriage articles of Richard, had recently, by the death of James's widow,

[ 190 ]

ALDRIDGE<sup>r.</sup> and under the limitations of his will, fallen into and now formed  
WESTBROOK. part of the estate of Richard.

Some time after the death of Richard a bill was filed on behalf of his creditors, to obtain payment of their debts; and two of the children of James also filed another bill for the purpose of having the benefit of the marriage articles, and in that suit it was declared that they were entitled to have the benefit of the settlement. Under these circumstances,

*Mr. Pemberton and Mr. Randell*, for parties claiming under the articles, now contended, that they had, as against the general creditors of Richard, an equity to have the mortgage for 4,200*l.* kept on foot for the purpose of giving them a lien on the second moiety of the estate, to the extent of the amount of the rents of the first moiety, which through the breach of trust of Richard had been received by the widow of James, to the disappointment of the persons entitled thereto under the marriage articles.

*Mr. Kindersley*, for the creditors of James, *contra*, contended, that the parties claiming under the articles had no lien on the other moiety of the estate, and that they must come in, under the covenant, *pari passu* with the other creditors.

*Mr. Tinney, Mr. Busk, Mr. Turner, and Mr. Paton*, for other parties.

#### THE MASTER OF THE ROLLS :

[ • 191 ] There is some complication in the facts of this case, and I have certainly had some difficulty in clearly comprehending \*the effect of those facts. [After stating the above circumstances his Lordship continued.] It has been declared, that the widow and the children of Richard are entitled to the benefit of the articles, or to the first moiety of the property, the legal estate of which has now, by the death of the widow of James, become available for the purposes of the settlement. The widow, therefore, of Richard, is now entitled for her life to receive the rents and profits of that moiety, and after her death the children will be entitled in remainder. The legal estate of that moiety is, therefore, entirely applicable to the purposes of the settlement; but it appears that the mortgage executed by Richard, comprised not only the moiety of Woodma-cotes, which was subject to the articles, but also the other moiety

of that property which, at a subsequent period, Richard purchased from James; and the widow of Richard now claims to be entitled to a lien upon that other moiety of Woodmacotes for the loss she has sustained. It is said that the mortgage being made for the benefit of Richard, and subsisting as a valid mortgage at the time of the death of James, when it was disposed of by his will, and being afterwards continued for the benefit of the widow of James, ought now to be continued for the benefit of the widow of Richard, who, by the act of Richard in making the mortgage, enabled the widow of James to intercept the rights of the widow of Richard under the settlement, and, for a time, wholly to deprive her of the rents of a moiety of the estate, to which under the articles she was entitled.

ALDRIDGE  
v.  
WESTBROOK.

Now what happened with respect to that moiety? The mortgage debt was a part of the estate of James. By the effect of the will of James that debt, as regarded the interest of Richard, ceased to be a debt. It was given to Richard, who by virtue of the mortgage was \*a debtor, but by virtue of the bequest, became at the same time a creditor. How is that debt to be kept up for the purpose of answering this claim? I apprehend that, if it could be done in any way, it would be, by having the mortgage, in the first instance, in some way distinguished from all the other property, as well of Richard as of James. In one sense, and in one sense only, is it distinguished from the property of James, because, if I understand the matter, the other property of James has been administered, and by virtue of the mortgage, the property has been heretofore enjoyed by his widow. On the other hand, the mortgage money received by Richard was never kept separate or apart: it constituted a debt due from Richard, and not a sum of money received by him and distinguished from the other part of his estate, in such a way that a lien could be established upon it for the benefit of his widow.

[ \*192 ]

Under these circumstances, I confess, though I have been a good deal affected by the ingenuity of the argument employed in the discussion of the case, which has shown very plausible reasons for it, and though I have felt a disposition, which, I think, every body must feel to establish the claim if it could be effected, I cannot see any mode of getting at a distinct part of the property of James, so as to make it subject to this lien for the benefit of the widow of Richard.

The estate of Richard will be administered according to the ordinary rules, and this and every other part of his property is subject to debts and claims which may be made upon it.

ALDRIDGE  
 c.  
 WESTBROOK.  
 [ \*193 ]

The best opinion I can form upon this is, that I do not think this lien established, and the widow must therefore come in as a specialty creditor only, in respect \*of the violation of her rights under the marriage articles.

The Court, as I have been informed, decided another point in the second suit, the MASTER OF THE ROLLS holding, that where a creditor's bill was filed by a mortgagee who was also a creditor by simple contract, he was entitled to payment of his mortgage money out of the mortgaged estate, before the payment of any part of the costs of the suit.

1841.  
 Dec. 3, 6.  
 1842.  
 Jan. 15, 17, 18.  
 May 10.

*Rolls Court.*  
 Lord  
 LANGDALE,  
 M.R.  
 [ 193 ]

### WILLATS v. BUSBY.

(5 Beav. 193—200; S. C. 12 L. J. Ch. 105.)

A decree made in the absence of a material party, but without prejudice to his rights and interests.

A. B. executed a voluntary settlement of real estate in favour of his wife and children, and afterwards contracted to sell it for valuable consideration. The purchaser filed a bill for specific performance against the vendor, his wife, children, and the trustees in whom the legal estate was vested. One of the children was out of the jurisdiction, and did not appear. The Court decreed a specific performance, and ordered the trustees to convey to the purchaser, saving the rights of the absent party.

IN 1812 Edward Sclater Busby, being seised of some freehold property at Bethnal Green, conveyed it by a voluntary post-nuptial settlement, to trustees, in trust for his wife Janet Busby, and afterwards for the children of their marriage, of whom there were two, viz. David William Busby and another son.

In 1834 Edward Sclater Busby contracted to sell the same property to the plaintiff Mr. Willats. The trustees, however, who had the legal estate, refusing to convey the property, the plaintiff, in consequence, filed \*this bill for a specific performance of the contract against Edward Sclater Busby, and wife, and their two children, and the trustees of the settlement.

David W. Busby was out of the jurisdiction of the Court, and could not be found so as to be served with process (1). The cause was now brought to a hearing without having David W. Busby before the Court.

*Mr. Pemberton, Mr. Kindersley, and Mr. James Russell, for the plaintiff.*

(1) 3 Beav. 420.

*Mr. Tinney* and *Mr. K. Parker*, for the wife of the settlor. \* \* \*

WILLATS  
v.  
BUSBY.

*Mr. Bethell* and *Mr. Bacon*, for the brother of David W. Busby, and

[ 195 ]

*Mr. Campbell*, for the representatives of the surviving trustees, supported the objection.

*Mr. Pemberton*, *Mr. Kindersley*, and *Mr. James Russell*, *contra*.

\* \* The Court cannot adjudicate on the rights of an absent person; but that will not prevent a decision of the questions between those who are present. \* \* \*

*Mr. Tinney*, in reply. \* \* \*

[ 196 ]

His Lordship [after referring to some cases which had been cited where the court had declined to make a decree affecting the rights of absent parties] concluded that the objection, in this form, was not in the nature of a preliminary objection, and that he must hear the cause and see what, under the circumstances, was right, just, and convenient to be done.

1841.  
Dec. 6.  
[ 198 ]

The cause was then heard again upon the merits, and was argued by the same counsel.

\* \* \* \* \*

#### THE MASTER OF THE ROLLS :

When this cause was brought on for hearing, an objection was taken that David William Busby, one of the \*defendants, was out of the jurisdiction of the Court, and that in his absence no decree could be made against any of the defendants. The objection being overruled, the cause was heard, and it appeared to me that the plaintiff was entitled to a specific performance of the agreement stated in the bill; but that the decree should be framed so as to leave to the absent defendant a right of claiming any right or interest which he might have in the property; and on consideration I am of opinion that the decree ought to contain a clause stating it to be without prejudice to any right or interest in or to the premises comprised in the settlement, which may be claimed by the defendant David William Busby. The decree will therefore be as follows :

Decree that the agreement in the pleadings mentioned, dated the 19th day of March, 1834, be specifically performed and carried

1842.  
May 10.  
[ 199 ]  
[ \*200 ]



WILLATS  
r.  
BUSBY.

into execution. And upon the plaintiff or the defendants Rushbridge and Harcourt, the legal personal representatives of the late plaintiff Henry Thomas Willats, paying the sum of 3,800*l.*, the residue of the purchase-money, it is ordered that the representatives of the surviving trustee in the indenture dated the 12th day of February, 1812, and all other necessary parties as the Master shall direct, convey the said premises to the plaintiff. And it is ordered that the Master do settle the conveyance in case the parties differ. And in case the Master shall find that the said David William Busby is a necessary party to such conveyance, and the said David William Busby shall not come in to execute the same, it is ordered that this decree be without prejudice to any right or interest which may be claimed by the said David William Busby in or to the premises comprised in the said indenture of the 12th day of February, 1812.

1842.  
Feb. 17, 19,  
26.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 201 ]

### DAVIES *v.* FISHER (1).

(5 Beav. 201—215; S. C. 11 L. J. Ch. 338; 6 Jur. 248.)

A testator gave his widow the power of appointing his residuary estate. By her will, after reciting the power, she declared that, in pursuance of the power and all other powers enabling her, for the purpose of disposing of her husband's and her own estate, she made her will as follows: she then directed her debts to be paid, and gave some legacies; and as to all the rest, &c. "of her personal estate," she bequeathed the same to A. and B. upon trust, &c.: Held, that the widow (who died in 1832) had thereby appointed the residuary estate of her husband.

A gift of personalty to trustees for A. for life, and after his death in trust for the children of A. "as they severally attained twenty-five years," the income to be applied during their respective minorities by their guardian for their maintenance, &c., with a gift over in case no child of A. should live to attain twenty-five. Held to be vested, and not too remote (2).

THE testator James Davies, by his will, dated the 18th day of September, 1824, after directing payment of all his debts, and funeral and testamentary expenses, and giving divers pecuniary legacies, bequeathed all the residue of his estate, both real and personal, unto his wife, Ann Davies, deceased, her heirs, executors, and administrators absolutely, and he appointed his wife and William Powell his executors.

(1) General powers are now exercised by a residuary testamentary disposition. See Wills Act, s. 27, but decisions under the old law on the testamentary exercise of general

powers may still be applicable to the testamentary exercise of special powers since the Wills Act.—O. A. S.

(2) *In re Merrin* [1891] 3 Ch. 197, 60 L. J. Ch. 671, 65 L. T. 186.

On the 20th of September, 1824, the testator made the following codicil to his will. "Whereas by my will as aforesaid, bearing date the 18th day of September in the year 1824, I have directed my wife, Ann Davies, to be my residuary legatee: in case she the said Ann Davies dies without making a will after my decease, the remainder of all my property, whatsoever it may consist in, whether bank, consolidated, funded property, houses, furniture, plate, books, linen, wearing apparel, &c., to be equally divided, share and share alike, among my brother William Davies' four children, as named: William Davies junior, James Davies junior, Martha Ann West, and Mary Davies, or to as many of the aforesaid children as may be living at the decease of the said Ann Davies. Likewise I direct and appoint William Davies junior my residuary legatee instead of my wife, Ann Davies, and the forenamed William Powell."

The will and codicil were unattested.

The testator died in December, 1824. His wife, who survived him, made her will dated in April, 1832, and thereby, after reciting that the testator, James Davies, her late husband, did by his aforesaid will and codicil appoint her his residuary legatee, and direct in case of her death, without making a will after his decease, that his nephew, William Davies the younger, should be his residuary legatee, she the said Ann Davies, in pursuance of the power and authority given and reserved to her in and by the will of James Davies the elder, and of all other powers and authorities in anywise enabling her, did, for the purpose of disposing of all the estate of her said late husband, James Davies, over which she had any disposing power, and also of all her own estate and effects whatsoever and wheresoever, make her last will and testament in manner \*following (that is to say): First, she appointed James Fisher and William Powell executors of her said will; and after directing payment of her debts, and funeral and testamentary expenses, she bequeathed to James Davies, the younger, a legacy of 2,000*l.* Three per cent. Consolidated Bank Annuities, and to James Fisher and William Powell the sum of 4,000*l.* Three per cent. Consolidated Bank Annuities upon trusts therein mentioned, for Martha Ann West and her children therein mentioned; and after bequeathing several annuities and legacies, and directing her executors to appropriate so much stock out of her residuary estate as would be sufficient, in point of yearly income, to answer the same annuities, and directing that from the decease of the respective annuitants the same should sink into and form part of her residuary estate, she bequeathed to

DAVIES  
F.  
FISHER.  
[ 202 ]

[ \*203 ]

DAVIES  
F.  
FISHER.

[ \*204 ]

James Fisher and William Powell her three leasehold messuages and premises, situate in Park Street, Islington, for all her estate therein, upon trust to sell the same, and apply the produce upon the same trusts as were thereafter declared concerning her residuary personal estate; and as to all the residue of her personal estate whatsoever, and wheresoever, and of what nature or kind soever not specifically bequeathed or disposed of by her will, she bequeathed the same unto James Fisher and William Powell, upon trust to sell, get in, and convert into money the whole of her personal estate, or such part thereof as should not consist of money in the funds or on Government, or real, or leasehold securities, and out of the produce thereof to pay her debts, funeral and testamentary expenses, and pecuniary legacies, and make the appropriations necessary for answering the said annuities. And upon trust to invest the clear surplus monies arising from her residuary estate, including the proceeds of the said leasehold houses, in manner therein mentioned. And she directed \*her trustees to stand possessed of her residuary estate, including the proceeds of her said leasehold houses, and the investments thereof, upon trust during the life of William Davies the younger, to pay the income thereof unto William Davies the younger, and from and after his decease in trust for the children of the said William Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child, the income to be applied during their respective minorities by the guardian for the time being of the said children or child for their respective support, maintenance, and education. And in case no child of the said William Davies should live to attain the age of twenty-five years, then in trust for the children of the said James Davies the younger, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal. And in case no child of the said James Davies the younger should attain the age of twenty-five years, then in trust for the children of Martha Ann West, as they severally attained the age of twenty-five years, equally to be divided between them if more than one, and if but one, the whole to such one child, the income to accumulate in the intermediate time, and be paid with the principal; with a limitation over in the case of Martha Ann West having no child who should live to attain the age of twenty-five years.

The testatrix afterwards made a codicil to her will, dated the 6th of May, 1832, and thereby gave certain specific parts of her personal estate to the persons therein named, but she did not otherwise revoke or alter her will.

DAVIES  
v.  
FISHER.

The testatrix died in June, 1832, and William Davies the younger having died in 1834, this bill was filed by his children, insisting that they took vested interests in the residuary estate bequeathed by the will of Ann Davies, including therein the residuary estate of the testator: that they were entitled to the payment thereof at twenty-five, and to have the income applied for their maintenance during their minority.

[ 205 ]

*Mr. Pemberton* and *Mr. Keene*, for the plaintiffs, contended that the gift to them, though given "as they severally attained the age of twenty-five years," was, nevertheless, a valid vested interest, the dividends being payable to them in the meantime: *Skey v. Barnes* (1), *Jones v. Mackilwain* (2), *Murray v. Addenbrook* (3), *Bland v. Williams* (4), *Vivian v. Mills* (5), *Blease v. Burgh* (6), *Saunders v. Vautier* (7). They argued also, that William Davies the younger was the substituted residuary legatee, and took in preference of the widow.

*Mr. Hardy*, for the representatives of William Davies the younger :

In no case can the representatives of Mrs. Davies be entitled, for the testator appointed William Davies junior "his residuary legatee instead of his wife."

*Mr. Chandless* and *Mr. Hoare*, for William Powell, one of the executors of the widow, and the surviving executor of the testator :

\* \* The limitation over is simply void as inconsistent with the previous absolute estate: *Ross v. Ross* (8). \* \* \*

[ 206 ]

*Mr. Roupell* and *Mr. Bilton*, for the executors of James Davies, and for his child [cited *Lewis v. Lewellyn* (9), *Napier v. Napier* (10),

(1) 17 R. R. 91 (3 Mer. 335).

(2) 25 R. R. 32 (1 Russ. 220).

(3) 28 R. R. 144 (4 Russ. 407).

(4) 41 R. R. 93 (3 My. & K. 411).

(5) 49 R. R. 372 (1 Beav. 315).

(6) 50 R. R. 165 (2 Beav. 221).

(7) 54 R. R. 286 (Cr. & Ph. 240).

(8) 20 R. R. 263 (1 Jac. & W. 154).

(9) 23 R. R. 201 (T. & R. 104).

(10) 27 R. R. 144 (1 Sim. 28), and see *Hughes v. Turner*, 41 R. R. 171 (3 My. & K. 666).

DAVIES *Bradly v. Westcott* (1), and other cases where a power was held  
 v.  
 FISHER. not to be exercised by will].

*Mr. Kindersley and Mr. George Turner*, for the next of kin of  
 Ann Davies, the widow :

[ \*207 ] The property belonged absolutely to Mrs. Davies, under the will  
 of her husband. There was an absolute gift to her in the first  
 instance, which has not been cut down, for the gift to the children  
 “as they attained twenty-five” is void. This has been settled by  
 a long series of decisions ; *Leake v. Robinson* (2), *Bull v. Pritchard* (3),  
*Vawdry v. Geddes* (4), *Ring v. Hardwick* (5), *Newman v. Newman* (6).  
 The direction for maintenance is insufficient to make it vest ;  
*Batsford v. Kebbell* (7) ; the \*maintenance is given merely during  
 the minorities of the children, so that during the period which  
 might elapse between their attaining twenty-one, and their attaining  
 twenty-five, there is no gift to them of the dividends.

The property has been validly appointed to Mrs. Davies’  
 executors, and the gift to the children being void, the executors  
 are trustees for the next of kin of Mrs. Davies : *Goodere v. Lloyd* (8).

Again, the contingency has not happened upon which the  
 property was given over by the will of the testator to the children  
 of William Davies the younger, for the widow did not “die without  
 making a will :” *Scott v. Bargeman* (9).

William Davies was substituted, not for Mrs. Davies, but for Mrs.  
 Davies and William Powell who were executors, and the testator  
 could not therefore have intended him to take as residuary legatee.

*Mr. Tinney, Mr. Wood, Mr. Spence, Mr. Bacon and Mr.*  
*Blower*, for other parties.

*Mr. Pemberton*, in reply.

Feb. 26. THE MASTER OF THE ROLLS :

In this cause the principal question depends upon the construction  
 which ought to be given to the residuary bequest contained in the  
 will of Ann Davies.

James Davies, by his will dated the 18th September, 1824, gave

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|--------------------------------------|--------------------------------|
| (1) 9 R. R. 207 (13 Ves. 445).       | (6) 51 R. R. 206 (10 Sim. 51). |
| (2) 16 R. R. 168 (2 Mer. 363).       | (7) 4 R. R. 15 (3 Ves. 363).   |
| (3) 25 R. R. 27 (1 Russ. 213).       | (8) 30 R. R. 214 (3 Sim. 538). |
| (4) 32 R. R. 196 (1 Russ. & M. 203). | (9) 2 P. Wms. 69.              |
| (5) 50 R. R. 202 (2 Beav. 352).      |                                |

his residuary estate to his wife Ann Davies absolutely for ever ; and by a codicil, dated two days \*afterwards, namely, the 20th September, 1824, he directed that if she died without making a will, the remainder of his property should be equally divided among his brother William Davies' four children.

DAVIES  
v.  
FISHER.  
[ \*208 ]

James Davies died, leaving his wife surviving him, and she was absolutely entitled to dispose, by her own will, of the residuary estate bequeathed to her by her husband's will.

By her will, dated the 4th April, 1832, she recited the will of her husband, and declared her purpose to dispose of all his estate, and also all her own estate ; and having thus declared her purpose, she proceeded, without making any distinction between his estate and her own, to dispose of the whole, as if it had been hers alone, and I think that she has done it in a manner sufficient to pass both. After giving several legacies, she gave the residue and remainder of her personal estate to Fisher and Powell, upon trust, to sell : to pay her debts and pecuniary legacies : to set apart sufficient sums to answer the annuities : to invest the surplus in their joint names, and stand possessed of the securities on which the same should be invested, in trust, during the life of W. Davies, to pay the interest, dividends and annual produce of her residuary personal estate to him, and she then proceeds as follows : " And from and after the decease of the said W. Davies, in trust for the children of the said W. Davies, as they severally attain the age of twenty-five years, equally to be divided between them if more than one, and if but one, then the whole to such one child ; the income to be applied during their respective minorities, by the guardian, for the time being, of the said children or child for their \*respective support, maintenance, and education. And in case no child of the said W. Davies shall live to attain the age of twenty-five years, then in trust for the children of James Davies," in manner therein mentioned.

[ \*209 ]

The question is, whether the gift to the children of W. Davies is void for remoteness, and it is necessary to consider : first, the effect of the direction to divide between the children as they severally attained the age of twenty-five years ; secondly, the effect of the direction to apply the interest during the minorities of the children for their support, maintenance, and education ; and, thirdly, the effect of the gift over.

As to the first point, I think that if the directions to divide had stood alone, the gift would have been too remote. In this case, as

DAVIES  
v.  
FISHER.

in *Leake v. Robinson* (1), it is only through the medium of the directions given to the trustees, that we can ascertain who were the persons intended to take, and what benefits were intended for them. And the trust is for all the children of W. Davies as they severally attain the age of twenty-five years; none were to be excluded, and none to have any thing till the age of twenty-five years was attained. This would be too remote. But,

Secondly, expressions of this kind of themselves, importing a postponement of the vesting, may be so controlled by other expressions and circumstances, as to postpone payment or possession only and not the vesting; and it has been held, that a direction to apply the interest for the benefit of the legatee, affords evidence of intention to vest the capital; and it has not been [ \*210 ] disputed, that if the testator had directed the whole \*interest to be applied for the benefit of the legatees, during the whole time between the death of the tenant for life and the time of payment, and if there had been no gift over, it must have been held that the capital was vested; but in this case, as the direction does not extend to the whole time, but is confined to the minorities of the children, and as the application is to be by the guardian, for the support, maintenance, and education of the children, it was argued that the interval between the twenty-first and twenty-fifth year of each child, during which there is no direction to apply the interest, prevents the direction from being considered as a direction to apply the whole interest, and, therefore, does not afford the presumption that the whole was intended to vest.

In *Hoath v. Hoath* (2), *Walcott v. Hall* (3), *Murray v. Addenbrook* (4), and many other cases, the direction was to apply the whole interest; and the gifts were held to be vested. In *Leake v. Robinson* (1), and *Bull v. Pritchard* (5), the trustees had authority or power to apply the interest, or so much as they should think proper, or so much as they might deem necessary towards the maintenance of the children, and in *Vaudry v. Geddes* (6), the interest was at the discretion of the executors to be applied in the maintenance of the children, or accumulated for their benefit until they should severally attain twenty-two years of age, and in these cases it was held, notwithstanding the power, authority, or direction to apply the interest or part of it to the maintenance of the

(1) 16 R. R. 168 (2 Mer. 363).

(5) 25 R. R. 27 (1 Russ. 213).

(2) 2 Br. C. C. 4.

(6) 32 R. R. 196 (1 Russ. & My.

(3) 2 Br. C. C. 305.

203).

(4) 28 R. R. 144 (4 Russ. 407).

children, that it was the vesting, and not merely the possession or time of payment which was postponed.

But too much reliance must not be placed on the expression "the whole interest," which has been used in some of the cases. In *Lane v. Goudge* (1) 30*l.* a year, part of the interest was given to an annuitant for life. In *Jones v. Mackilwain* (2) an annuity of 100*l.* was given out of the interest to the father of the children, and in *Bland v. Williams* (3), there was a direction and not a mere power or authority to apply the interest, or a sufficient part thereof for the maintenance of the children, and to transfer the capital, with so much of the interest as should not be applied in maintenance, to the children, when and as they should attain twenty-four years, and in those cases the gifts were held to be vested.

I have found no case precisely like the present, in which payment being postponed beyond minority, the express direction to apply the interest extends only to the minority. The case is, that the testatrix, having expressed a trust as to her residuary estate for the children of William Davies, makes no distinct gift of interest, but proceeding as if she had already done what was requisite to entitle the children to the interest, she directs the interest to be applied for their support, maintenance, and education by the guardian during their minorities. She appears to me to express herself as if she considered the children entitled to the interest by the direction to divide the capital at a future period. She did not consider the interest and the capital to be blended together, but on the contrary, so expresses herself, as, by the direction, to imply a gift to the children of the benefit or enjoyment of the interest immediately after the death of the tenant for life. The inference or implication arises from the direction to apply the interest, \*and although the direction is limited to the minorities, it is not necessary, or I think reasonable to limit the inference or the implication in like manner, or to the mere time to which the direction applies. There is a gift payable at a future time, and a direction showing that the donees are to have the benefit of the interest on the death of the tenant for life. This direction expresses that, during the minorities, the interest is to be applied by the guardian for support, maintenance, and education, and there is no express direction as to the application of the interest after the minorities have ceased. At that time the mode of enjoyment

DAVIES  
v.  
FISHER.  
[ 211 ]

[ \*212 ]

(1) 7 R. R. 163 (9 Ves. 229).

(3) 41 R. R. 93 (3 My. & K. 411).

(2) 25 R. R. 32 (1 Russ. 220).



DAVIES  
F.  
FISHER.

expressly directed will cease, but I do not think that it is therefore to be concluded that there is to be no enjoyment, and on this part of the case it appears to me, that the second part of the residuary bequest, the direction as to the application of the interest, qualifies the first direction for the division of the residue, and that the result of the direction to divide, followed by the direction to apply the income, would, without more, be to give vested interests in the residue to the children of William Davies.

Thirdly. But then it is argued that the gift over is wholly inconsistent with that conclusion, and shows that the testatrix could not have intended to give vested interests. The argument rests entirely upon *dicta* of Sir JOHN LEACH, in the cases of *Vaudry v. Geddes* (1) and *Bland v. Williams* (2).

[ \*213 ]

In *Vaudry v. Geddes*, that learned Judge is reported to have expressed himself thus : “ If the whole interest had been expressly given to the children until they attained twenty-two, I do not agree that the shares of \*the children would therefore have vested subject to be divested ; the case of *Batsford v. Kebbell*, which is referred to by Sir W. GRANT in *Leake v. Robinson*, is an authority directly in point against that proposition. Where interim interest is given, it is presumed that the testator meant an immediate gift, because, for the purpose of interest, the particular legacy is to be immediately separated from the bulk of the property ; but that presumption fails entirely, when the testator has expressly declared that the legacy is to go over, in case of the death of the legatee, before a particular period,” and in *Bland v. Williams*, he is reported to have said, that “ if the gift over, is simply upon the death under twenty-four, the gift could not vest before that period.”

It is to be observed, that in neither of these cases did the facts require any decision upon the points to which the *dicta* related.

In *Vaudry v. Geddes*, the gift over to the surviving children of any sister was upon the death of any of such children without leaving issue ; and the gift over to the surviving sisters and their children or issue, was upon the death of all the children of any of his sisters without issue. The question related to a share of residue, not to a particular legacy, and there was no distinct gift of interest as in *Batsford v. Kebbell*, but a direction to apply or accumulate the interest till the age of twenty-two.

In *Bland v. Williams*, the gift over was upon the death under twenty-four without leaving issue, and the gift was held to be vested.

(1) 32 R. R. 196 (1 Russ. & My. 207).

(2) 41 R. R. 93 (3 My. & K. 411).

The proposition which, in argument, was founded upon these *dicta* of Sir JOHN LEACH is, that in a case \*where there is a gift payable at a future time, in terms which in themselves import contingency, and a subsequent direction to apply the interest, in a manner, which, notwithstanding the contingent form of the gift, would, in the absence of any gift over, vest the legacy, the mere circumstance of a gift over, simply on the death before the time of payment, does of itself prevent the vesting.

DAVIES  
FISHER.  
[ \*214 ]

In ordinary cases, a gift over upon a contingency does not prevent vesting in the first donee, for, although it is reported that in the case of *Scott v. Bargeman* (1), Lord MACCLESFIELD stated the reason for his decision to be, that the shares of the legatees did not vest absolutely in any of them, in regard it was possible all might die under twenty-one or marriage, in which case it was devised over, yet in *Skey v. Barnes* (2) Sir WILLIAM GRANT observed, that the reason seemed to imply a proposition that is untenable in law, viz., that the mere circumstance of all the shares being given over on a contingency, does of itself, and without more, prevent any of the shares from vesting in the meantime; and he added, that he took it to be clear, that a devise over upon a contingency had no such effect, provided the words of bequest were in other respects sufficient to pass a present interest. Such a devise over of the entirety may, indeed, be called in aid of other circumstances, to show that no present interest was intended to pass; but that it is alone sufficient to prevent vesting, cannot, I think, be maintained.

Now, in the present case, it appears to me that the words of bequest to the children of William Davies are sufficient to pass a present interest. Such appears to me to be the true construction of the words which the \*testatrix has used, and when we have once reached the result or meaning of the words under consideration, I apprehend that effect should be given to that meaning, just as if it had been expressed in direct and unambiguous terms. The meaning must, indeed, be collected from the whole will; but the gift over does not, in this case, appear to be accompanied by any other circumstances, tending to show that no present interest was intended to pass; but, on the contrary, affords some evidence of an intention to divest after a previous vesting. And, on the whole, it appears to me that the residuary bequest to the children of William Davis is valid.

[ \*215 ]

(1) 2 P. Wms. 69.

(2) 17 R. R. 91 (3 Mer. 340).

## SCOTT v. MILNE.

(5 Beav. 215—221; affirmed, 12 L. J. Ch. 233; 7 Jur. 709.)

In the absence of fraud imperfect partnership accounts which have been long acquiesced in will not be re-opened although shown to be defective and not finally settled, but where the accounts disclosed outstanding demands in respect of which subsequent receipts are admitted an account of such subsequent receipts may be directed.

IN 1806, James Milne and his son James Milne the younger, entered into partnership as tailors, on the terms stated in a deed made and executed between them.

IN 1808 the son died, leaving his wife sole executrix and legatee.

In November, 1812, she married the plaintiff Mr. Scott, and shortly previous thereto, viz., in October, 1812, James Milne the elder, furnished Mr. and Mrs. Scott with two accounts, the first headed, "The stated account of the partnership of Messrs. Milne," which showed on one side the gross amount of the sales during the \*partnership, and of the stock at its conclusion, and on the other, the capital of the partners, leaving a balance of net profits of 3,862*l.*, and outstanding debts remaining due to the partnership amounting to 2,094*l.* It also stated, that all the debts due from the partnership were satisfied.

The second account was headed, "Mr. James Milne in account with Mrs. Milne, the widow of his late son," and stated, on the one hand, the son's share of the capital and profits, and on the other, payments made on account thereof, and showing a balance of 167*l.* due from the widow, which was stated to be deducted from the receipt of outstanding debts.

These accounts were of a general or summary nature, and did not comprise the items of the account but merely stated the gross result.

James Milne the elder died in October, 1834, and two years after, the plaintiffs made an application to the defendant, the widow and executrix of James Milne the elder, for accounts of the partnership. In August, 1836, a Mr. Starling, who acted for the defendant, furnished the plaintiffs with an account which was headed as follows, "An account of cash advances to and expenditures on account of the late Mr. James Milne, jun., made by the late James Milne, sen., being payments on account of the claim of Mr. W. G. Scott, and Mary his wife, under the partnership estate of Messrs. Milne & Son."

It set forth a number of payments alleged to have been made by

1841.

*Feb.* 18.*Rolls Court.*Lord  
LANGDALE,  
M.R.

On Appeal.

1842.

*July* 18.

1843.

*Feb.* 15.Lord  
LYNDHURST,  
L.C.

[ 215 ]

[ \*216 ]

James Milne the elder to his son and to the plaintiff Mrs. Scott respectively, from the 8th of May, 1806, to the 10th of November, 1812, both inclusive, and amounting in the whole to the sum \*of 2,279*l.* 12*s.* 6*d.*, and at the foot of the account was the following memorandum in writing, signed by Margaret Milne. "I hereby claim to be allowed to me all the before mentioned sums of money, amounting in the whole to the sum of 2,279*l.* 12*s.* 6*d.*, out of and towards satisfaction of the share of capital of my late son, besides his advancement of 500*l.*, and also his share of profits under the late partnership estate of Messrs. Milne & Son, to be ascertained by an account I have engaged to furnish you of the same, over and above such other sum and sums I may be enabled to show has been paid to or advanced on account of my late son's interest in the said partnership. As witness my hand this 13th day of August, 1836. Margaret Milne."

SCOTT  
v.  
MILNE.  
[ \*217 ]

The defendant soon afterwards sent to the plaintiffs a further account, which was headed, "An account of the receipts and expenditures under the partnership estate of Messrs. Milne & Son," furnished by Mrs. Margaret Milne, executrix of the late Mr. James Milne the elder, who was the surviving partner. In this account credit was given for monies received by James Milne the elder, both before and after the accounts were rendered by him in the year 1812.

In 1838 the plaintiffs filed this bill against the defendant, praying a general account of the partnership transactions.

The bill alleged that errors existed in the several accounts, which errors were not, however, proved.

There was no evidence to show that the two accounts rendered by the testator in 1812 had not been acquiesced in, from the time they were delivered, down to the death of James Milne the elder in the year 1834; but \*it was alleged by the bill, and admitted by the answer, that sums had been received by James Milne the elder, subsequent to 1812, on account of the outstanding debts, but which the answer also stated had been accounted for.

[ \*218 ]

The defendant insisted that the accounts were settled and acquiesced in; that she was protected by the Statute of Limitations, and was not bound to account at all, or at most that she was only bound to account for the debts received since 1812. She also imputed improper conduct to Mr. Starling in procuring her to sign and send the accounts, and she said that he acted as the agent, and was in the interest of the plaintiffs.

SCOTT  
v.  
MILNE.

The cause now came on for hearing.

*Mr. Pemberton* and *Mr. Wood* for the plaintiffs, contended they were entitled to a general account. That the accounts were still open and subsisting, and that no settled account had been shown, and that even those of 1812 did not contain the items, but were general in their nature; and, lastly, that the conduct of the defendant had been such, as to waive any objection arising from lapse of time or acquiescence.

*Mr. Tinney* and *Mr. Ellison* for the defendant, contended, that the plaintiffs having acquiesced in the account for twenty-two years were barred by the Statute of Limitations and their own *laches* from unravelling the account, that the defendant was not liable at this distance of time to account at all, and at all events, only for the receipt of the outstanding debts.

That the accounts had been rendered by the defendant merely for her satisfaction, and under the wrong advice of *Mr. Starling* who was intimately connected with the plaintiffs, and that she had done so \*under the impression that her legal rights would not be prejudiced.

[ \*219 ]

*Mr. Pemberton*, in reply.

[None of the cases cited were referred to by the Judge.]

#### THE MASTER OF THE ROLLS:

The accounts rendered in 1812, though summary, show that great care was taken to ascertain what the state of the account between the parties at that time was. The evidence is wholly silent as to how the accounts were made out, or what access was given to the books, or what examination of them took place at the time. The accounts were delivered in October, 1812, and it is not shown that they were not acquiesced in without any objection from the time of their delivery to the death of *Milne the father*. *James Milne*, the father, died in October, 1834; and two years afterwards application was made to *Mrs. Milne*, his legal personal representative, for an account. That account was rendered by *Starling*, who it is proved was consulted by the defendant; the books were examined by him, and by a letter it appears that he communicated with her in respect of what he was to do, and an account was sent in

consequence of her instructions. This account comprised not only the transactions of the partnership previous to 1812, but those subsequent which related to the outstanding debts. Another account was \*also rendered of the sums advanced to the son and his widow, being the same sums for which James Milne the elder took credit in the account of 1812. Disputes took place, and in 1838 this bill was filed, praying for a general account. This lady by her answer, after admitting that the account was rendered, states that she did it by bad advice, suggests that Starling acted in collusion with the plaintiffs, insists she ought not to be bound by the accounts, and that the matter ought to be treated as if the accounts had not been rendered; and she claims to be exempted from accounting, in consequence of the lapse of time. Starling is examined for the plaintiff, but he is not cross-examined; no cross bill is filed; but the defendant claims what she might possibly have been entitled to if there had been a cross bill and the facts had been fully proved. I cannot however on this record think that the defendant is entitled to any such relief; there is no ground established in the evidence for imputing misconduct to Starling, and I cannot assume misconduct in him.

SCOTT  
v.  
MILNE.

[ \*220 ]

The case then is a very short one; the account was delivered in 1812; at that time it might have been thoroughly investigated, and there is no evidence to show that every opportunity for investigation was not given. It appears to have been acquiesced in, from the time when it was delivered to the time when the demand was made for a general account. If that demand had not been complied with, I should say, without the slightest hesitation, that there had been such an acquiescence as ought to bind the parties. The question is, whether what took place afterwards is to take away the effect of the acquiescence, and I think it ought not. My opinion is, that I ought not to open the accounts; but the receipt of outstanding debts subsequent to 1812 being admitted, I must direct an account in respect of the outstanding debts.

Seeing that the account of 1812 admits there were outstanding accounts to a considerable amount which it was the duty of the surviving partner to collect, and seeing by the account subsequently rendered that that collection did take place, and there being no reason for believing that any one of the sums were ever divided between the parties entitled, there is no reason for refusing an account of the monies received by the surviving partner after the date of the account of 1812.

[ 221 ]

SCOTT  
v.  
MILNE.

[The plaintiffs appealed from this decision, as reported in 12 L. J. Ch. at p. 235.]

[12 L. J. Ch.  
235 ]

*Mr. Bethell* and *Mr. Wood* appeared for the plaintiffs, and

*Mr. Tinney* and *Mr. Ellison*, for the defendant.

1843.  
*Feb. 15.*

[ 236 ]

THE LORD CHANCELLOR [after stating the facts and referring to the absence of items in the accounts, said]:

If a party chooses to acquiesce in an account stating only results, where they are intimately connected in this way, it must be because they were satisfied the account was correct; and I do not think after a period of twenty-two years, twenty-four years I think, and after the death of the party who could best explain the nature of the account, that a bill of this description ought to be sustained.

But then there is another circumstance that was relied on, and which is really the main question in the cause. When an application was made to the widow she at once acceded, and desired accounts to be made out; and two accounts were made out and rendered, corresponding in some respects with the account which had been before stated: I mean in its form, for it was an account of the monies which had been received from time to time, or paid on account of the son, and which account corresponded very nearly with the account as rendered in 1812. Then, on the other hand, there was the account of the proceeds of the partnership and the disbursements, which account does not correspond, but deviates in some material particulars from the account which had been so rendered; but it does not appear to me, that at the time when the application was made to this lady, for the purpose of rendering these accounts, she was aware exactly of what had taken place in 1812. She knew that some settlement had taken place, but there is nothing to show she knew exactly what the nature of that settlement was. It was said by *Mr. Bethell*, I find on referring to my note, that if she did not know it, *Mr. Starling* did. Now, *Mr. Starling*, it appears, (and that is the only circumstance from which we can infer it,) was the messenger, who carried this account at the time when it was made out to *Mrs. Scott*; but there is nothing to show that he was apprised or knew what the contents of the account were. At all events, it is quite clear, they were not fresh in his mind, and I refer for that purpose to his letter of the 6th of October, which is in evidence, and which he addressed to the widow

SCOTT  
v.  
MILNE.

of the surviving partner, from which I collect that neither he nor the widow knew exactly what the nature of the account was that had been so rendered. Under such circumstances, I do not think the desire manifested by the widow to give the explanation ought to make any alteration in the case. I think, after a period of twenty-two, or rather of twenty-four years, the party is concluded from proceeding in a court of equity for the purpose of opening this account. It is said, that there was an error on the face of the account, but that error was not insisted on before the Master of the Rolls. Another error was insisted on, that was explained in the course of the inquiry. The error here insisted on is, that no interest was allowed upon the 500*l.* which had been so advanced; but if there was an error, it was an error apparent on the face of the account, and the account was rendered twenty-two years ago. It ought to have been set right long before this time. The party had an opportunity of knowing it, of investigating it, of making inquiry of the surviving partner; and therefore I think it is too late to say, because there is an error of that description on the face of the account, that therefore the account ought to be entirely unravelled. But I doubt very much whether there is any such error, because that 5*l.* per cent. was not a debt due from Milne, the surviving partner; he was not to pay the 5*l.* per cent.; the partnership was to pay it; it was a disbursement from the partnership, and it might well be included under that general item of disbursements during the three years. It was the partnership that was to pay the interest, and therefore it might properly be entered as a disbursement. It does not therefore appear to me, that of necessity there is any error in that account, or the interest might have been paid in various ways, which might have admitted of explanation if the subject had been canvassed within a reasonable time after the account was settled. I am of opinion, therefore, that the general account cannot be opened, but I agree of course with what was stated by the MASTER OF THE ROLLS, that there must be an \*investigation as to the outstanding debts, of which it does not appear in evidence that any settlement ever took place. Therefore, I think, that the order of the MASTER OF THE ROLLS must be affirmed in the way in which he has settled it, and, I think, from the nature of it, it must be

[ \*237 ]

*Affirmed with costs.*



1842.

Jan. 12, 18,  
17, 29.*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 224 ]

## THORPE v. OWEN.

(5 Beav. 224—227; S. C. 11 L. J. Ch. 129.)

A testatrix gave her personal estate to B. for the benefit of B.'s daughters. B. invested the produce, together with 1,000*l.* of his own monies, in the funds in his own name, and afterwards treated and admitted the aggregate fund as held in trust for his daughters. On the death of B. the fund was found mixed with like funds of his own: Held, that under the circumstances, there was sufficient to constitute a trust of the 1,000*l.* in favour of the daughters.

In February, 1827, the mother of Henry Owen died, having by her will given her personal estate to the six daughters of Henry Owen, and she appointed him sole executor.

Henry Owen converted the whole personal estate, and invested it with a further sum of 1,000*l.*, part of his own money, in the purchase of 2,550*l.* 8½ per cent. Reduced Annuities.

In 1830 the eldest daughter came of age, when the testator paid her 455*l.* 15*s.* 6*d.* one-sixth of the whole fund, she giving a receipt for it as one-sixth of the estate of her grandmother and of the addition made thereto by Henry Owen the father, "amounting in the whole as above."

In 1834 another daughter came of age, when one-fifth of the residue of the aggregate fund was paid to her, on her giving a receipt for it, incorrectly describing it as one-fifth of the personal estate of the grandmother.

[ 225 ]

In 1838 a third daughter married Mr. Sadler, when her father covenanted to settle the "contingent share" in the legacy given by the grandmother's will, on certain trusts.

Accounts of the grandmother's estate being required on behalf of Sadler and wife, they were furnished by Henry Owen, through his solicitors, on the 20th of July, 1840. In them, the 1,000*l.* was included in the following terms: "1827, March 7th, added 1,000*l.*;" and one-fourth of the 2,550*l.* and dividends were stated to be due to Sadler and wife. Henry Owen also stated, in a letter accompanying the account, that he was ready to assign and pay over the 637*l.* 10*s.* to Sadler's trustees, and to account for the dividends.

On the 28th of July, 1840, the solicitors of Henry Owen, in answer to the last letter accompanying the account, wrote to him to the following effect: "You mention in yours received this morning, that the 1,000*l.* mentioned in your account was your own money. Now if so, *Quere* 1. We think that it should be kept out of the account now to be handed to Quilter and Taylor (the solicitors of Mr. and Mrs. Sadler), though you might, if you pleased, pay over

to Mrs. Sadler's trustees any larger sum than that which should appear strictly due from you.

THORPE  
v.  
OWEN.

"*Quere* 2. Was the 1,000*l.* a voluntary gift on your part without any legal obligation or debt?

"*Quere* 3. If so, we suppose this mode of giving a portion to your daughters was adopted as a convenience to yourself, since you would have the trouble of managing the fund of which you were trustee."

Henry Owen returned this letter to his solicitors, having written opposite the above *queries* as follows :

[ 226 ]

"*Quere* 1. As I have hitherto made the 1,000*l.* part of the testatrix's property, I cannot alter it.

"*Quere* 2. Yes.

"*Quere* 3. Yes."

In November, 1840, Henry Owen paid the trustees of Sadler and wife 44*l.*, for two years' dividends on 637*l.* 10*s.* stock ; and in the letter forwarding it through his solicitors, he again stated, that the trustees of Sadler were entitled to one-fourth of 2,550*l.* stock and of the dividends.

In April, 1841, a release was prepared from the instructions of Henry Owen, which was executed by one of the parties, but was not executed by him in consequence of his death. It purported to be a release from one-fourth of the 2,550*l.* stock.

Henry Owen died in June, 1841, when the fund was found "amalgamated" with other stock of his own, and made together a sum of 6,350*l.* 3½ per Cents. which was still standing in his name. A petition was presented in the cause, for the purpose of determining the question, whether the 1,000*l.* voluntarily invested by Henry Owen in his own name, was affected with a trust in favour of his daughters ?

*Mr. Pemberton* and *Mr. Josiah W. Smith*, for the widow and personal representatives of Henry Owen, stated the facts of the case.

*Mr. Kindersley*, *Mr. Stinton*, and *Mr. C. Hall*, for the daughters and their trustees, contended that the testator had devoted the 1,000*l.* to the same trusts, as those on which he held the personal estate of his mother, and that he had done sufficient to affect him with the trust, so as to bind his representatives.

[ 227 ]

*Mr. Tinney*, *Mr. O. Anderdon*, *Mr. Collins*, and *Mr. Trotter* contended, that as no legal interest in the 1,000*l.* had passed from

THORPE  
r.  
OWEN.

the testator, and as there had been no declaration of trust, this Court could not assist volunteers in perfecting an incomplete trust. That this fund must, therefore, be considered part of the general estate of Henry Owen. [*Antrobus v. Smith* (1), *Edwards v. Jones* (2), *Jefferys v. Jefferys* (3), and other cases were cited.]

The MASTER OF THE ROLLS ordered the cause to stand over to see if any further evidence could be produced. On a subsequent day, he held that a trust had been declared of the 1,000*l.* in favour of the daughters, and he directed payment thereof accordingly.

1842.  
*Feb.* 14, 16,  
21.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.  
[ 229 ]

## GORDON v. THE CHELTENHAM AND GREAT WESTERN UNION RAILWAY COMPANY.

(5 Beav. 229—241 ; S. C. 2 Rail. Cas. 800.)

Distinction between the effect of acquiescence, upon a motion for an injunction and on a demurrer. In the former case acquiescence merely prevents the special protection by injunction, but in the latter it must be such as to disentitle the plaintiff to any relief whatever.

THIS case came before the Court upon a general demurrer to the whole bill, and on a motion for an injunction.

[ 230 ]

The bill stated, that in 1836 a bill was brought into the House of Commons authorising the defendants to make their railway, which it was proposed should pass through the plaintiff's estate, and that the plaintiff, apprehending annoyance therefrom, opposed the bill.

An agreement was, however, come to between the parties, by which it was, among other things agreed, "that no public station should be established on the estate without permission."

The Act passed; and by the 15th section, it was enacted as follows: "That it shall not be lawful for the said Company to make or establish any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things, upon the estate of the said Robert Gordon, his heirs or assigns, or within fifty yards of the boundaries thereof, without the previous consent in writing of the said Robert Gordon, his heirs or assigns, for that purpose had and obtained."

(1) 8 R. R. 278 (12 Ves. 39).

(3) 54 R. R. 249 (Cr. & Ph. 138).

(2) 43 R. R. 178 (1 My. & Cr. 226).

The defendants had, however, lately made a well and tank, and built two wood cottages, and an engine-house and stable on the property, and within the prescribed limits; and they had lately dug the foundations for and commenced the erection of a stone building of a permanent character (which was intended as a dépôt for coals, coke, and ashes) on part of the land.

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

The bill alleged, that the trains stopped at the point in question for the purpose of changing the engines; and after stating the inconveniences resulting to the plaintiff and his family, it prayed an injunction to restrain \*the defendants from using the said engine-house, cottages, and other buildings so erected as aforesaid, or any of them, for depositing, receiving, loading, or keeping any passengers or cattle, or any goods, engines, or other articles, matters, or things, and from continuing the erection of the buildings, so commenced, and from making, erecting, or establishing upon the plaintiff's lands, or within fifty yards of the boundaries thereof, any public station, yards, wharfs, waiting, loading, or unloading places, warehouses, or other buildings and conveniences, for the depositing, receiving, loading, or keeping any passengers or cattle, or any goods, articles, matters, or things.

[ \*231 ]

To this bill the defendants filed a general demurrer, which now came on for argument, together with an application on behalf of the plaintiff for an injunction.

*Mr. G. Turner and Mr. W. P. Wood* in support of the demurrer, and in opposition to the motion for an injunction, contended that the defendants had not acted in contravention of the Act.

[Upon this point the MASTER OF THE ROLLS ultimately expressed his opinion in favour of the plaintiff, and the question of construction is not included in this report.]

The plaintiff, they also said, had acquiesced in such a way as to disentitle him to relief. \* \* \*

[ 232 ]

*Mr. Pemberton, Mr. Kindersley, and Mr. Goldsmid, contrà*  
[upon the question of acquiescence, said]:

As to acquiescence, the plaintiff has been lulled by the representations of the officers of the defendants. He protested all along, and being naturally desirous of avoiding coming to this Court, he took no legal proceedings until his rights were disputed; this first happened on the 30th of December, when the defendants claimed adversely the right to make this erection.

[ 233 ]

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

Acquiescence upon an application for an injunction, is different from acquiescence upon demurrer. In the one case, it merely disentitles the plaintiff to the protection of the Court by special injunction, but in the latter case, it must amount to such a waiver of his rights as to destroy the right altogether.

THE MASTER OF THE ROLLS [upon the question of acquiescence, said]:

The argument as to acquiescence is, no doubt, very important upon the consideration of the motion for an injunction. A short acquiescence may properly induce the Court not to interfere *ex parte*. A longer acquiescence may, under the circumstances, throw serious doubt upon the right of the plaintiff, and induce the Court not to interfere by any interlocutory order, even when applied for on notice. But when acquiescence is used as an argument in support of a demurrer, there must, to make it effective, be such an acquiescence as wholly to disentitle the plaintiff to any relief. It must assume that the plaintiff originally had a right, but that he has altogether deprived himself of it, by his acquiescence. There is clearly no such acquiescence in this case. The plaintiff

[ \*234 ] seems to \*have objected all along to the proceedings of the defendants, and the answers of the defendants' officers seem to have been such, as to have lulled him until the 30th of December, when, for the first time, they claimed, under the Act of Parliament, a right to do the acts here complained of. \* \* \*

The motion for the injunction was then discussed, but it is not necessary to repeat the arguments.

Feb. 16.

THE MASTER OF THE ROLLS [after dealing with the question of construction of the Act of Parliament, said]:

[ 237 ]

The next objection is, that this gentleman has acquiesced so long, that he is not entitled to the protection of the Court. I cannot help being surprised at the perseverance with which that argument has been urged. I am of opinion that there is no such acquiescence as to deprive the plaintiff of the protection of the Court. That he knew of what was going on, seems to me to be

[ \*238 ]

\*beyond all doubt. I think the knowledge of his agent must be considered as his knowledge; but at every period of the work from its very commencement, it appears to me perfectly clear he was objecting to the proceedings. The application he made to the directors was in the nature of an objection; the conversation he had with Mr. Brunel was in the nature of an objection; and

in fact it must be assumed, I think, that if there had been anything which the Company thought to be acquiescence, I should have heard of it in a very different form from that in which it is suggested to me; I should have had it in evidence. Then it is said there was delay in filing the bill. Was that a delay which gave the defendants any right, or deprived the plaintiff of any? He saw something going on which he objected to, which he considered to be a violation of his rights under the Act of Parliament. He was told in the month of September, that it was a temporary erection only. Would it then have been correct on his part, or right in him immediately to have commenced litigation on the subject? or rather, was it not a proof of his moderation, and desire to accommodate the Company, when he acquiesced in what he was led to consider a mere temporary violation of his rights, in the expectation that it would only last for a short time? The first time, as far as I can understand from the evidence, that the Company claimed a right under the Act of Parliament to do the acts, was by a letter on the 30th of December, and in a month from that time the plaintiff filed his bill. I cannot imagine how it is supposed that this is to be considered such an acquiescence as to deprive him of all right whatever, or to give the defendants any right they would not have had, if such acquiescence had not taken place. They have not given evidence to show that they have incurred any expense on the faith of the plaintiff's acquiescence, and I am of opinion, therefore, \*that there is no acquiescence to deprive the plaintiff of any right to which he was entitled.

GORDON  
f.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

[ \*239 ]

The next point for consideration does certainly appear to me to be a very material one, that is, what are the inconveniences to which the parties would be subject by the granting of an injunction? It is, to a certain extent, discretionary with the Court whether it will, on interlocutory application, grant this extraordinary remedy; and with regard to that, the length of time that has elapsed is not immaterial. The inconveniences to which the Company may be subject, are, I must say, looking at these affidavits, stated in a manner which is extremely unsatisfactory. It has been argued strenuously, that if this injunction be granted, the consequence will be, that the line of railway cannot be safely used: that the safety of the persons who may travel on it will be endangered; and that by stopping the traffic on other parts of the railway, the public will be greatly inconvenienced. On this point I wish to state, that if I felt satisfied that there was that great

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.

inconvenience, then looking on the other hand to the nature of the inconvenience suffered by Mr. Gordon and his willingness to accommodate, and the amount of inconvenience on the other side so strongly urged in argument, but in evidence so weakly supported, I ought rather to abstain from granting this injunction until this matter had been further investigated.

[ \*240 ]

And this brings me to the last point in this case, which is, whether there ought to be any proceeding at law, either before the injunction is granted, or directed as a condition on which the injunction is granted. The Court has regard to the circumstances of each case. Sometimes it finds it most conducive to the justice of the case to grant an injunction at once, \*putting the party who has obtained it on terms to bring an action to support his right which has appeared to a court of equity so strong that it has acted on it, though at the same time, it wished to have it corroborated by the decision of a court of law; sometimes, from the great inconvenience, and at other times from the extreme doubt, it has considered it would be best, on the whole, that the injunction should be suspended till the right at law has been determined. These are courses which the Court takes, but I have some little doubt whether I am now in possession of all the evidence that is material for the purpose of determining this case. At any rate before I decide that point, which is the only one, I think I ought carefully to read the cases decided by Lord COTTENHAM. I do not think that I shall be doing any injury to the plaintiff if I suspend this for a few days. I shall reserve my judgment, and give it on Monday morning. At the same time I think I shall not be doing any wrong by allowing the defendants to inform me, much more accurately than they have done, what would be the consequences of stopping this by injunction.

*Feb. 21.*

The MASTER OF THE ROLLS said, that he had read the affidavits, which showed that there were inconveniences on both sides, but that in this, as in all other cases of injunction to prevent the use of works devoted to the public, it became necessary to consider on which side the inconvenience would press most, until the ultimate determination of the question in the cause, either by means of an action at law or by carrying the case to the House of Lords. That he had looked anxiously to find if there was any prospect of a limit in time, in regard to the inconvenience complained of by the plaintiff, but he could find none, and this seemed to him to be

the \*strongest point against the defendants, and on the whole he was of opinion that the plaintiff was entitled to an injunction.

By arrangement between the parties, the operation of the injunction was suspended for a limited period, the defendants undertaking to appeal from the decision.

GORDON  
v.  
THE CHEL-  
TENHAM  
RAILWAY  
COMPANY.  
[ \*241 ]

NOTE.—The case came before the LORD CHANCELLOR, on appeal, in November, 1842, and he directed the opinion of a court of law to be obtained as to the construction of the Act of Parliament. A further report of this case will be found in 2 Rail. Cas. 800.

### GRIFFITHS v. EVAN.

(5 Beav. 241—245; S. C. 11 L. J. Ch. 219.)

1842.  
March 19, 23.

A. devised to B. an estate during the life of herself and her husband, and after their deceases to the lawful issue of B.'s body for ever. Held that B. took an estate tail.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 241 ]

A. devised to B. in tail, and for want of issue of her body "he empowered and authorized" her to settle and dispose of the estate to such persons as she thought fit by her will, "confiding" in her not to alienate or transfer the estate from his "nearest family." B. appointed to her husband for life, with remainders over: Held that B. had a power of appointing to the "nearest family" only, that nearest family must be construed "heir," and that consequently the appointment to the husband was void.

THE testator in this cause, by his will dated in 1786, devised two freehold estates, of which, subject to a mortgage, he was seised, unto his eldest daughter Mary Evan, the wife of Stephen Evan, to hold to her, in terms expressed as follows: *i.e.* "for and during the term of her natural life and the life of her husband Stephen Evan, and from and after their several deceases, to the use and behoof of the lawful issue of the body of the said Mary Evan for ever; and for want of such issue, I do hereby empower and authorize her my said daughter Mary Evan to settle and dispose of my said estate, to such person or persons as she shall \*think fit, in and by one instrument in writing, being her last will and testament legally executed and attested by three credible witnesses, confiding in her my said daughter, that she will not, by the said instrument, alienate or transfer my said estate from my nearest family; subject nevertheless, and I do hereby charge my said estate to the payment of the mortgage already contracted and entered on by one David William."

[ \*242 ]

The testator then charged the estates with certain sums for his three younger daughters, and proceeded in the following terms: "And I do further recommend my said three daughters, Rachel,



GRIFFITHS  
F.  
EVAN.

Hannah, and Hesther, to the tender care and protection of my said daughter and devisee Mary Evan, fatherly advising her to make every further and additional provision for them in her power, as far as her circumstances will afford, on account that I have made this distinction, and preferred her to a higher station in the enjoyment of my both real and personal estate."

After the testator's death Stephen Evan paid off the mortgage, and got a conveyance to a trustee.

Mary Evan made her will in 1814, and thereby she devised the estate in question, and all other her real estate to her husband for life, with remainder to David Evan (his son by a former marriage, who was the great nephew of the testator, being the grandson of the testator's sister), to hold to him and his lawful issue for ever, &c.

Mary Evan died in 1828, without having had issue, and without having suffered a recovery, and her husband entered into possession.

[ 243 ]

Stephen Evan died in 1838, and David Evan, the sole defendant, entered into possession.

The bill was filed by the co-heirs of the testator, being the testator's younger daughter, and the children and a grandchild of the other two daughters, who were dead, against David Evan. It prayed that the defendant might let the plaintiffs into peaceable possession of the property, and deliver up the title deeds, and for an account of the rents, &c. from the death of Mary Evan, and that what might be found due might be set off against the defendant's lien, &c.

*Mr. Pemberton and Mr. Jenkins, for the plaintiffs:*

The gift is to Mary Evan for the joint lives of herself and her husband, with remainder to her lawful issue; consequently, under the rule in *Shelley's* case, the estate to herself and that to her issue coalesced, and on the whole she took an estate tail in the property, and this she has never barred: *Douglas v. Congreve* (1).

The power either enabled her to appoint to the testator's "nearest relations" alone, or the word "confiding" created an imperative trust on her not to "alienate or transfer" the estate from the testator's "nearest relations." In the former case she has not executed the power, and the property passes, in default of appointment, to the testator's heir. In the latter case there is a trust for the heirs as "nearest relations:" *Knight v. Knight* (2); for the word "family," when applied to real estate, means heir: *Wright v. Atkyns* (3).

(1) 49 R. R. 290 (1 Beav. 59).

(2) 52 R. R. 74 (3 Beav. 148).

(3) 13 R. R. 199; 24 R. R. 3 (19 Ves. 299; T. & R. 143).

*Mr. Kindersley* and *Mr. Evans*, for the defendant, contended, that the estate devised to the issue, and the estate *pur autre vie*, did not coalesce. “Assise per Lodington, quesii home done terre al A. B. pur terme dauter vye, le remaynder al heires de son corps engendres, oncore il nad que a terme dauter vye, durant le vye cesty que vye, tamen dicitur quod non est lex”<sup>(1)</sup>; and that *Mary Evan* had, therefore, an estate for her own and her husband’s life, and a power of devising to her husband for life.

GRIFFITHS  
v.  
EVAN.  
[ 244 ]

Secondly, that the power limited to her, was to “dispose” of the estate “to such person as she should think fit,” which was a general power, and that she had executed it by her will, in favour of her husband and the defendant.

Thirdly, that the expression “nearest family” rendered the trust, if any, void for uncertainty: *Doe v. Joinville* (2), *Harland v. Trigg* (3). \* \* \*

The MASTER OF THE ROLLS held, that *Mary Evan* took an estate tail, with a power of appointing to the testator’s “nearest relations,” which expression was, in this case, equivalent to heir. That the appointment was in equity void, and that the plaintiffs were therefore entitled as from the death of *Mary Evan*. An inquiry \*was directed of what was due on the mortgage, on account of the principal and interest, and on the other hand, the usual account of the rents as against a mortgagee in possession was ordered; and upon payment of the balance, a conveyance of the estate was directed to be made. No costs were given on either side.

[ \*245 ]

## GLENGALL v. BARNARD.

(5 Beav. 245—246.)

1842.  
March 23.

*Rolls Court.*

LORD  
LANGDALE,  
M.R.

[ 245 ]

Part of a residuary estate, settled on one for life, with remainder to her issue, consisted of life annuities and policies on the lives for securing the principal money. The Court seeing it for the benefit of all parties, refrained from ordering a sale, but directed the policies to be kept up, so as to secure the principal, and that the surplus annuities should be paid to the tenant for life.

THIS was a suit for the administration of the estate of *Mr. Mellish*. It appeared that, on the marriage of one of his daughters, he had settled considerable property, and had given

(1) Brooke’s Abr. Estates, 296.

(3) 1 Br. C. C. 142.

(2) 6 R. R. 585 (3 East, 172).

GLENGALL  
v.  
BARNARD.

a life estate therein to the husband. The husband had parted with his whole life interest by charging annuities thereon.

The testator bought up the annuities, and kept up policies on the husband's life, whereby the principal money was secured. The annuities and policies formed part of the testator's estate, which he had by his will settled on his daughters and on their issue in remainder.

The trustees, under the circumstances, were of opinion that it would be more beneficial to all parties to retain the annuities and keep up the policies, than to sell and invest the produce.

[ \*246 ] *Mr. Pemberton* admitted, that the strict rule would be to sell the annuities and policies, and after investing the produce, to pay the dividends to the tenants \*for life, but argued that, as those securities would realise much less than would be ultimately secured by the policies, it would be for the benefit both of the tenants for life and those in remainder, that they should be retained, and that the amount of the annuities, after payment of the premiums, should be paid to the tenants for life.

The will, he said, contained a discretionary clause, enabling the trustees to sell as they deemed advisable.

*Mr. Kindersley*, *Mr. Bacon*, *Mr. Teed*, and *Mr. Koe*, for different parties.

The MASTER OF THE ROLLS said, that under the circumstances, he thought the arrangement beneficial, care being taken to keep up the policies, and that the decree must be prefaced with a declaration, that this course appeared to the Court beneficial for all parties.

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## LUCENA v. LUCENA.

(5 Beav. 249—250.)

1842.  
April 26.  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 249 ]

A testator gave his widow a power of appointment amongst his children over a fund, which, in default of appointment, was given between them, but the shares of daughters to be for their separate use for life, with remainder to their children. The widow, by a will not executed with the formalities required by the power, gave the fund to the children equally. The Court supplied the formalities.

THE testator gave a sum of 24,000*l.* to trustees for his widow for life, with power to her of appointing 12,000*l.*, part thereof, amongst his children, by will attested by two witnesses, and in

default of appointment to fall into the residue. He gave the residue between his children, but as to his daughters, for their separate use for life, with remainder to their children.

LUCENA  
t.  
LUCENA.

The widow, by a will which was not attested, appointed the 12,000*l.* between her sons and daughters equally; and the question was, whether this Court would aid the defective execution.

*Mr. G. Turner* and *Mr. Bloxam* argued that there was no case in which this Court would aid the defective execution of a power in favour of children, where their right would not be wholly defeated by the non-execution of the power; and here the children would take in default of appointment, with the advantage that the shares of the daughters would be for their separate use.

[ 250 ]

*Mr. Kindersley* and *Mr. Collins* contended that the Court would supply the defective execution of the power in favour of the children.

*Mr. Tinney*, *Mr. Taylor*, and *Mr. Freeling*, in the same interest.

The MASTER OF THE ROLLS held that the formality was to be supplied, and that the daughters took absolute interests in their shares.

## SIDEBOTHAM *v.* BARRINGTON.

(5 Beav. 261—263.)

1842.  
June 8.

[A NOTE of this decision will be found at the end of the report of some earlier proceedings in the suit in 52 R. R. 212; see p. 215.]

[ 261 ]

## AGABEG *v.* HARTWELL.

(5 Beav. 271—273.)

1842.  
June 28.

By the decree the costs of all parties were ordered to be taxed as between solicitor and client. Upon a rehearing the decree was affirmed, and the deposit was ordered to be returned, but nothing was said as to costs. By a subsequent order the costs of all parties were ordered to be taxed, as between solicitor and client, from the last taxation. Held, that this did not include the costs of the rehearing.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

[ 271 ]

The costs of rehearings are not carried by the words “costs of suit as between solicitor and client,” but they require to be specially mentioned in the order for taxation.

*Semble.* The same rule applies to the costs of appeals, and exceptions.

THIS case came before the Court upon petition under the following circumstances:

On the 6th of August, 1832, upon petition for payment of a sum

AGABEG  
c.  
HARTWELL.

out of Court, an order was made by the VICE-CHANCELLOR, *inter alia*, to tax all parties their costs of and relating to the suit as between solicitor and client.

On the 15th of February, 1833, by the decree of the VICE-CHANCELLOR, an order was made, *inter alia*, to tax all parties their costs of this suit, subsequent to the last taxation thereof, as between solicitor and client.

On the 22nd of May, 1834, upon a rehearing before the Lord Chancellor, the decree was affirmed. The deposit was ordered to be returned, but nothing was said as to costs.

On the 12th of May, 1835, an order to tax all parties their costs, as between solicitor and client, of and relating to these suits, subject to the last taxation of costs, was made by the decree of the MASTER OF THE ROLLS.

On the 12th of December, 1837, an appeal was heard, and a decree made by the House of Lords, whereby the decrees of the VICE-CHANCELLOR and LORD CHANCELLOR were reversed, and the case was referred back to the Court of Chancery.

[ \*272 ] On the 28th of April, 1840, an order was made by the LORD CHANCELLOR, altering the orders, and proceedings \*in conformity to the order of the House of Lords ; but no variation was made in the order for the taxation of costs.

The question was, whether the decree of the 12th of May, 1835, entitled the parties to their costs of the rehearing before the Lord Chancellor in May, 1834.

*Mr. Tinney and Mr. F. H. Goldsmid*, in support of the petition.

*Mr. Pemberton and Mr. Blunt*, *contra*.

The MASTER OF THE ROLLS said he should inquire of the sworn clerks what was the understood practice in such cases.

The sworn clerks returned the following Certificate :

“ Six Clerks’ Office, June 25th, 1842.

“ We, the undersigned Clerks in Court, beg leave to state that we are of opinion that the LORD CHANCELLOR’S order of the 22nd of May, 1834, giving back the deposit to the petitioner, is a disposal of the question of costs of the rehearing ; and that the order of the 12th May, 1835, though it gives all parties their costs, as

between solicitor and client, of and relating to these suits, subsequent to the last taxation, would not authorize the Master to include the costs of the rehearing, because it would be giving the order of the MASTER OF THE ROLLS, by whom the order of 12th May, 1835, was made, the effect of giving costs which the LORD CHANCELLOR, by his order of 22nd May, 1834, had refused to give.

“It is a general rule that costs of appeals, rehearings, and exceptions are not carried by the words, ‘Costs of suit as between solicitor and client,’ but require to be specially mentioned in the order for taxation.

AGABEG  
HARTWELL.

[ 273 ]

“RICHARD MILLS.

“JOHN WAINEWRIGHT.

“JAMES THOMAS HORNE.”

The MASTER OF THE ROLLS, after referring to the Certificate, decided in conformity therewith.

June 28.

## GRIEVESON *v.* KIRSOPP.

(5 Beav. 283—288.)

1842.  
June 27, 28.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

[ 283 ]

An estate directed to be sold was limited to A. for life, and (as was then supposed) a moiety thereof was, as real estate, limited to B. in remainder. A. conveyed, and B. confirmed B.'s moiety and all their estate, &c., therein by way of mortgage, and they further assured it by fine. It turned out that B. had one fifth only in remainder as personalty. Held, that A.'s interest in one fifth only was affected by the mortgage.

UNDER the will of the testator, dated in 1795, his widow, Mrs. Carr, was entitled for life to a freehold property called Staley, as to which, the testator had given certain directions respecting the sale for the benefit of his six children. The interests of the parties in remainder had not, in the year 1819, been ascertained, but it was supposed, that subject to the life interest of Mrs. Carr, the property belonged, as real estate, to Mary Kirsopp and Sarah Carr Grieveson (the child of a deceased child of the testator), in coparcenary.

At this time (1819), Sarah Carr, the widow, Mary Kirsopp (the wife of John Kirsopp), John Grieveson, and Sarah Carr the younger, were indebted to Michael Dodd, on bond, in the sum of 200*l.*; and John Kirsopp was indebted to Sarah Carr, the widow, in the sum of \*1,000*l.* and upwards. Under these circumstances a deed was executed, dated in December, 1819, which was made between Sarah Carr, widow, of the first part, John Kirsopp and

[ \*284 ]

GRIEVESON  
v.  
KIRSOPP.

Mary his wife of the second part, a trustee of the third part, and Dodd and wife of the fourth part, reciting the death of four out of the six of the testator's children without issue, and either intestate or infants; and reciting the death of Mrs. Grieveson (another of the six children), leaving Sarah Carr Grieveson an infant, "in whom, together with Mary Kirsopp, the real estate of the said testator was then vested in coparcenary," subject to a mortgage and to such interest as Sarah Carr had therein; and also reciting that Dodd and Mabel his wife had, at the request of the said Sarah Carr, the widow, and the said John Kirsopp and Mary his wife, agreed to lend them the sum of 1,000*l.* to pay off the debt due from John Kirsopp to Sarah Carr, upon having that sum and the 200*l.* due on bond secured on mortgage of the undivided moieties, hereditaments, and premises, as thereafter mentioned; it was witnessed, that, in consideration of 1,000*l.* paid to Sarah Carr by Dodd and wife, and the 200*l.* due, Sarah Carr did grant, &c. and convey, and John Kirsopp and wife did grant, &c. and confirm unto the trustee and his heirs, all that one undivided moiety or half part of them the said John Kirsopp and Mary his wife, in right of the said Mary, and of and in the said estate and premises called Staley therein particularly described, and the allotments thereto, and also of and in all other messuages, lands, tenements, and hereditaments whatsoever, late of him the said John Carr the testator in the parish of Staley aforesaid, and all the estate, right, title, interest, possession, property, claim, and demand whatsoever of them the said Sarah Carr and John Kirsopp and Mary his wife, or any or either of them, of, in, or to the said undivided moieties, hereditaments, and premises, and \*every part and parcel thereof, in trust for Dodd and his wife, subject to redemption. There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption on payment of 1,200*l.* and interest to Dodd and his wife, by Kirsopp and his wife; and on payment there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage, and subject to the interest of Sarah Carr; and Kirsopp personally covenanted to pay the mortgage money.

[ \*285 ]

In 1824, a fine was levied pursuant to the covenant.

Long after the date of the deed, it was ascertained (1) that the property belonged to the widow for life, with remainder (as personal

(1) 44 R. B. 305 (2 Keen, 653).

estate) in fifth shares between Mrs. Kirsopp the surviving child, and the representatives of the four deceased children.

GRIEVESON  
r.  
KIRSOPP.

Mrs. Carr, the widow, as representing her deceased children, became entitled to one sixth part of the produce of the estate. She died in 1829.

Under these circumstances a question arose, as to the extent to which the interest of Mrs. Carr, the widow, was affected by the deed of 1819.

*Mr. Purvis* contended, that the deed and fine operated on the whole of the widow's interest in the moiety of the property.

*Mr. Pemberton*, *contra*, contended that the effect of the deed and fine was, to make merely the widow's interest \*in the share which Kirsopp and wife actually conveyed, viz. one fifth, liable to the mortgage.

[ \*286 ]

#### THE MASTER OF THE ROLLS :

June 28.

At the date of the deed in question, viz. on the 31st of December, 1819, Mrs. Carr was entitled to the premises therein comprised for her life, and subject to her life interest, the property, as personal estate, belonged in fifth shares to her surviving child, and the personal representatives of her four deceased children. The rights of the children had not then been ascertained, and it was supposed, that, subject to the life interest of Mrs. Carr, the property belonged, as real estate, to Mrs. Kirsopp and the child of a deceased child, in coparcenary.

At the same time, a debt of 200*l.* was owing to Michael Dodd, as executor of Paul Vaillant, which was secured by the bond of Sarah Carr, Mary Kirsopp, John Grieveson, and Sarah Carr the younger; a debt of 1,000*l.* was also due from John Kirsopp to Sarah Carr, and the deed was executed, in consideration of the bond debt, and of 1,000*l.* paid to Sarah Carr. The conveyance was made to a trustee by Sarah Carr, and by John Kirsopp and Mary his wife, and the property, purported to be conveyed, was, all that undivided moiety of Kirsopp and his wife, in right of the wife, in the several premises therein described, and all the estate of Sarah Carr, and Kirsopp and his wife in the same moiety, in trust for Dodd and his wife, subject to redemption. There was a covenant to levy fines, which were to enure to the use of the trustee for Dodd and his wife, and a proviso for redemption, on



GRIEVESON  
v.  
KIRSOPP.  
[ \*287 ]

payment of 1,200*l.* and interest to Dodd and his wife, by Kirsopp \*and his wife; and on payment, there was to be a reconveyance to Kirsopp and his wife, or as they appointed, subject to the mortgage and subject to the interest of Sarah Carr; and Kirsopp, personally, covenanted to pay the mortgage money.

Long after the date of the deed, it was ascertained that Mary Kirsopp, instead of being entitled, as heir, to a moiety of the estate, was entitled in her own right to only one fifth, as personal estate; and the question is, what, upon the construction and effect of the deed, is the effect of the conveyance executed by Mrs. Carr.

The estate being treated as personalty, Mrs. Carr became entitled to portions of the shares of her deceased children, who died intestate; and it is contended, that although Kirsopp and his wife, in her right, were only entitled to one fifth, subject to the life interest of Mrs. Carr, the conveyance by Mrs. Carr ought to extend to her own interest in an equal moiety of the whole. But, on perusal of the deed, I am of opinion that Mrs. Carr did not intend to convey, and that Dodd and his wife did not intend to receive from her, more than her interest in the share of the estate which was conveyed by Kirsopp and his wife; and I think, that the effect of the deed is not to pass more than her interest under the will, in so much of the estate as was conveyed by Kirsopp and his wife.

It being doubtful, upon the proceedings, whether Mrs. Carr the widow had joined in the fine, inquiry was made on the point, when it was ascertained that she was a party to it, and the case was then argued as to its operation.

[ 288 ]

*Mr. Purvis* contended that, as Mrs. Carr covenanted for herself and her heirs, her covenant was to be made good out of the lands (1). That a fine was a feoffment on record (2), and was conclusive evidence on production; and that Mrs. Carr was estopped from saying that the moiety did not pass (3).

*Mr. Pemberton, contra :*

The property is mere personalty, and the fine had no operation upon it. The security cannot extend beyond the intention of the parties to the deed; they were only dealing with the interests of Kirsopp and wife, and merely with such interest of the widow, as

(1) Co. Litt. 365 a.

(2) Shep. Touch. 5.

(3) Shep. Touch. 20.

she had in that portion of the property which belonged to Kirsopp and wife.

GRIEVESON  
v.  
KIRSOPP.

THE MASTER OF THE ROLLS:

I stated my opinion, that the intention of the parties was to convey the widow's interest in so much of the estate as was conveyed by Kirsopp and wife. I do not think that the fine operates beyond the deed, and the intention of the parties appearing on the deed.

### BRISTOW v. BRISTOW.

(5 Beav. 289—293.)

1842.  
June 28, 29.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 289 ]

A testatrix appointed a legacy out of a particular fund. By a codicil she revoked it, and gave a legacy of half the amount only, but without referring to the particular fund: Held, that the latter was a mere substitution for the former; and the particular fund failing, that the legatee was not entitled to be paid out of the general assets.

Dividends accruing on a specific bequest of stock before the same becomes transferable to the legatee pass with the stock.

\* \* UNDER the marriage settlement of Lady Bristow, a power was limited to her of appointing 5,000*l.* By her will she appointed a sum of 800*l.*, part of the 5,000*l.* to be equally divided between Mrs. Booth, her cousin, Mrs. Slater, and two other persons.

By a codicil she revoked the legacies given to Mrs. Booth, Mrs. Slater, and the other two persons, and proceeded thus: "I bequeath to each only 100*l.*"

It was decided in the case of *Bristow v. Boothby* (1), that the power of appointing the 5,000*l.* was void for remoteness; so that legacies given thereout failed. The Master to whom this cause was referred to take an account of the legacies, &c. reported the two of 100*l.* each given by the codicil to Mrs. Booth and Mrs. Slater amongst the general legacies; and to this part of his report, an exception was taken (2). \* \* \*

[ 290 ]

THE MASTER OF THE ROLLS held that the legacies of 100*l.* each were substituted for those of 200*l.* each, and were payable out of the same fund. He consequently allowed the exception.

The testatrix gave to a charity, called the Refuge for the Destitute, a sum of 1,700*l.* 4 per Cents., standing in the names of two trustees, which she directed "to be paid within twelve calendar months after her decease."

(1) 25 B. R. 248 (2 Sim. & St. 465). (4 Beav. 361), and the cases there

(2) See *Day v. Croft*, 55 B. R. 163 cited.

BRISTOW  
r.  
BRISTOW.

The stock had not been transferred, and two half-yearly dividends on the stock, amounting together to 68*l.*, had been received by the executors during the twelve months which elapsed after the testatrix's decease. These sums were claimed as part of the testatrix's general estate, on the ground that the executors were not, under the terms of the will, bound to transfer the stock until twelve months after her decease; and this point formed the subject of another exception to the Master's report.

[ \*291 ] The MASTER OF THE ROLLS, after hearing counsel in support of the exception, and without hearing the other \*side, overruled the exception, holding that the 68*l.* belonged to the legatees of the stock.

[The original report comprised other questions for decision which it is thought unnecessary to retain here.]

1842.  
June 30.  
*Rolls Court*  
Lord  
LANGDALE,  
M.R.  
[ 293 ]

## PERRY v. KNOTT (1).

(5 Beav. 293—297.)

The 32nd order of August, 1841, applied to a case of a breach of trust committed by several executors; and a cestui que trust might therefore, proceed against one in the absence of the others (2).

A suit may be maintained for a breach of trust in respect of an ascertained fund, by a party entitled to a moiety thereof, without making the person entitled to the other moiety a party.

THE testator, George Aldridge, gave and bequeathed unto his son Joseph Aldridge, his executors and administrators, the sum of 1,000*l.*, in trust for the separate use of Elizabeth, the wife of William Howell for life, and after her decease, equally amongst her children living at her decease. He appointed Deborah Aldridge, John Pricklow, Joseph Aldridge, and Edward Aldridge, his executors.

The testator died soon after, and his will was proved by his executrix and executors, who (according to the statement in the defendant's answer), shortly after the testator's death, transferred (out of the stock standing in the bank in the names of the executors and executrix), a sum of 3 per cent. Consolidated Bank Annuities, which, at the current price of such stock, at the date of such

(1) *Wilson v. Rhodes* (1877) 8 Ch. D. 777.

(2) This rule was afterwards replaced by Order VII. rule 2 of the Consolidated General Orders of 1860,

and see now Order XVI. rr. 6, 11 and 48, under which the present practice is regulated: *In re Harrison* [1891] 2 Ch. 349, 60 L. J. Ch. 287, 64 L. T. 442, and see *post*, p. 511.—O. A. S.

transfer, was worth 1,000*l.* sterling, into the joint names of Joseph Aldridge and Elizabeth Howell.

PERRY  
v.  
KNOTT.

Joseph Aldridge died in 1823, and Elizabeth Howell, who survived him, transferred the fund into her own name, and afterwards sold it out and applied it to her own use. Elizabeth Howell died in 1839, leaving two children, viz. the plaintiff Mrs. Perry, and William Howell.

The bill was filed by Mr. and Mrs. Perry, against Mr. and Mrs. Knott (the latter being the legal personal representative of Joseph Aldridge), seeking to charge his estate with a breach of trust, in consequence of the loss of the 1,000*l.* which had improperly been placed under the control of Mrs. Howell.

[ 294 ]

The defendants, by their answer, insisted, "that if any breach of trust was committed, touching the said stock, the same was committed by Edward Aldridge, Deborah Aldridge, and John Pricklow; and that they, or their personal representatives, as well as the said William Howell and the personal representatives of Elizabeth Howell, were necessary parties to the suit."

When the cause came on for hearing, on the 25th of June, 1841, the MASTER OF THE ROLLS held, that the other executors of the testator, and the representatives of Mrs. Howell, were necessary parties; but no decision was made as to the necessity of making the representatives of William Howell parties. The cause was ordered to stand over for want of parties, with liberty to amend. The order had been drawn up, but had not been passed by the Registrar. In the meantime the General Orders of August, 1841, came into operation.

The 32nd order directs, "that in all cases in which the plaintiff has a joint and several demand against several persons, either as principals or sureties, it shall not be necessary to bring before the Court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable" (1). The 51st order directs, "that the foregoing orders shall take effect as to all suits, whether now depending or \*hereafter commenced, on the last day of Michaelmas Term, 1841" (2).

[ \*295 ]

These orders having come into operation, the plaintiffs procured this cause to be set down to be reheard.

*Mr. Pemberton* and *Mr. Wood* for the plaintiffs, contended, that by the 32nd order of August, 1841, it was unnecessary to make

(1) Ord. Can. 174.

(2) Ord. Can. 178.

PERRY  
v.  
KNOTT.

the other persons guilty of the breach of trust, parties to this suit; and that the order was applicable to the present case; for, by the 51st order, the orders of August, 1841, were to take effect as to all suits then depending, and that this cause was so circumstanced.

That the object of the 32nd order was to relieve a party, having an independent claim against several persons, from the necessity of making them all parties to a suit.

As to the representatives of William Howell, who was entitled to the other moiety of the fund, being a necessary party, they again relied on *Smith v. Snow* (1) and *Hutchinson v. Townsend* (2).

*Mr. George Turner* and *Mr. Craig*, *contrà*, for *Mr. and Mrs. Knott*, the personal representatives of *Joseph Aldridge*:

[\*296]

The orders of August, 1841, were never intended to apply to a cause which had been heard and disposed of; and the 32nd order only applies to cases, where, by contract, a joint and several liability is created. Here the liability is not joint and several; a demand cannot be made against one of several executors: they must all be \*made parties, in order that the accounts, in which they are all interested, may be taken in their presence, and that they may have the benefit of a contribution, if the decree be ultimately worked out against one. How otherwise could accounts be finally taken in a creditor's or a legatee's suit? The suit is therefore still defective for want of parties, first, because the other executors of the testator who joined in the alleged breach of trust, or their representatives, are not before the Court; secondly, because the representative of *Mrs. Howell*, the person who really committed the breach of trust and received the money, is not a party; and, thirdly, because *William Howell*, or his representative, is not a party.

The case of *Smith v. Snow* has not been approved of; and it has always been admitted, that the principle of the decision in that case is not to be extended.

They also cited an unreported case of *Attorney-General v. Hughes* before Vice-Chancellor K. Bruce, in which the *Attorney-General* had filed an information against the surviving executor and the representatives of a deceased executor to obtain payment of legacy duty, without making the representatives of two deceased executors parties; and the Court (they stated) held that the latter were necessary parties if any account were to be taken.

(1) 18 R. R. 186 (3 Madd. 10).

(2) 44 R. R. 311 (2 Keen, 675).

## THE MASTER OF THE ROLLS:

PERRY

C.

KNOTT.

I think that the 32nd general order applies to so much of this case as relates to the persons who are alleged to have jointly committed the breach of trust; in the case cited (1), there may have been peculiar circumstances to require the decision stated to have been there made.

As to the next point, I conceive this to be a distinct demand for a distinct aliquot part of a distinct sum, and upon the authority of *Smith v. Snow* I think that the representative of William Howell is not a necessary party to the suit.

[ 297 ]

As to the third objection, I think the executor of Mrs. Howell is a necessary party, because she reaped the benefit of the second breach of trust.

It was ultimately referred to the Master to inquire when, and by whom, and under what circumstances, the 1,350*l.* was sold out, and whether or not with the privity and assent of the plaintiff, and whether any part was applied for the benefit of the plaintiff with liberty to state special circumstances.

## HENDERSON v. CONSTABLE.

(5 Beav. 297—300; S. C. 11 L. J. Ch. 332.)

1842.

June 30.

Rolls Court.

Lord  
LANGDALE,  
M.R.

[ 297 ]

A bequest was made of 2,500*l.* after the death of A., as A. should appoint, with a gift over "of the same" in default, and to be paid with interest from A.'s death. A. appointed a part to B., and 1,630*l.* to other persons, and directed the sums to be paid at the decease of B., except the one left to himself, which was to be payable at A.'s decease. Held, that the interest on the 1,630*l.* accruing between the death of A. and B. neither passed to the appointees of that sum, nor to B. by implication, but went over, as in default of appointment.

THE testator, John Henderson, bequeathed his personal estate to his executors, on trust to pay his wife an annuity of 100*l.* a year for life; and after her decease, to pay 2,500*l.* "to and among his children, or to the children of such of them as should be then dead," as his wife should appoint; and for want of such appointment, or as to such parts whereof no such appointment should be made, upon trust to pay "the same" equally among his six children (naming them), "or to the survivors, or to the children of such of them as should be then dead leaving issue, such issue being \*entitled to their parent's share thereof, and to be paid at the end

[ \*298 ]

(1) An unreported case of *A.-G. v. Hughes*.

HENDERSON of twelve calendar months after her decease, with interest for the same from the time of his wife's decease."

<sup>t.</sup>  
CONSTABLE.

The widow, by her will, after reciting her power, proceeded thus : now " I Sarah Henderson, in pursuance of the said power, &c., do appoint the said sum of 2,500*l.* as follows : " she then appointed 1,630*l.* only amongst certain objects of the power, and a further sum of 670*l.* to her son William Henderson, and she proceeded in the following words : " the said legacies or sums to be paid at the decease of my son William, except the one left to himself, to be payable at my decease."

The widow died in October, 1834, and William Henderson was still living.

The only question arose as to the interest which might accrue on the 1,630*l.* between the death of the widow and the death of her son William ; the widow having made that sum payable with interest from the death of her son William.

It was contended, first, that the interest must go to the parties entitled in default of appointment : [*Wilson v. Piggott* (1)].

[ 299 ]

Secondly, it was contended by the appointees of the 1,630*l.*, that the whole interest passed to them with the principal money as an incident thereto.

Thirdly, it was contended on behalf of William Henderson, that there was an implied gift to him of the intermediate interest : *Roe v. Summerset* (2) ; in which case, there was a gift to A. after the death of B., and it was held that B. took a life estate by implication.

Lastly, it was contended, on behalf of the residuary legatee, that as there was no appointment of the interest in question, and as the gift over in the testator's will was of " the same," viz., the capital, and not of the interest, the residuary legatee was entitled to the benefit of its non-appointment.

*Mr. Kindersley* and *Mr. Elderton*, for the plaintiff.

*Mr. Faber*, *Mr. S. Atkinson*, *Mr. C. Barber*, *Mr. Wray*, and *Mr. Phillips*, for several parties.

*Mr. Kindersley*, in reply.

THE MASTER OF THE ROLLS :

From the terms of the testator's will, I infer that the subject of the appointment, and of the gift in default of appointment, is the

same; namely, the principal sum of 2,500*l.* with interest from the wife's death.

HENDERSON  
v.  
CONSTABLE.

The widow has appointed 2,300*l.* only, and the interest on part of it, viz., on 1,630*l.* from the death of her son William. I think that those who take under the \*power can only take the sums appointed by her. William, therefore, takes 670*l.* immediately; and the other appointees have the time for payment of these legacies postponed until the death of William, and are entitled to interest only from that period.

[ \*300 ]

I cannot follow the argument that there is a gift to William Henderson by implication; I see no foundation for any such inference: there is a gift to persons in default of appointment, and there must be a distinct appointment in order to defeat the gift over.

The interest, which is part of the subject of appointment and of the gift over not being appointed, must go as in default of appointment; and the parties taking in default of appointment are therefore entitled to the interest accruing between the death of the widow and the death of her son William.

### KENDALL v. GRANGER (1).

(5 Beav. 300—304; S. C. 11 L. J. Ch. 405; 6 Jur. 919.)

1842.  
July 2.

A bequest of personalty to trustees, to be "applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility." Held, void as a charitable bequest.

Rolls Court.  
Lord  
LANGDALE,  
M.R.

[ 300 ]

THE question in this cause was as to the validity of a charitable bequest.

The testator William Kendall, after giving certain legacies, proceeded as follows: "All the rest and residue of my goods, chattels, testamentary estate, and effects and property real and personal (according to their respective natures and quality, including trust estates), I give, devise and bequeath to the above named Frederic Granger and John Squance, their heirs, executors, administrators, and assigns, upon trust, with all reasonable expedition, to sell and dispose thereof, as \*follows: after converting the whole into money, to divide the produce, and pay to each of the daughters of my brother lately deceased, who have arrived at the age of twenty-one years, and those now minors when they

[ \*301 ]



KENDALL  
 GRANGER.

attain that age, 400*l*. The remaining surplus monies, I will and direct, shall be at the disposal of the said Frederic Granger and John Squance, to be by them applied for the relief of domestic distress, assisting indigent but deserving individuals, or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever. Provided only, that should any difference or differences of opinion occur as to the application or distribution of any part of such surplus; then I direct, that such differences, as they may arise, shall be submitted by my trustees to the judgment of the above named Edmund Pollexfen Bastard, and that his decision shall be binding and conclusive on the subject in controversy. It is farther my express wish and intention, that, if practicable, the whole of such surplus monies be distributed and disposed of within three years after my decease."

He appointed Granger and Squance his executors.

The testator died in 1832, leaving both real estate and pure personalty of considerable value.

This bill was filed by his heir-at-law and next of kin, against the trustees, to have it declared that the alleged gift of the residue to charity was void.

The case came on for further directions, and the only question was, whether this was a valid charitable gift as regarded the pure personalty.

[ 302 ]

*Mr. Kindersley, Mr. Flather, and Mr. Terrell, for the plaintiffs.*

*Mr. Pemberton and Mr. Swinburne, for the defendants.*

*Mr. Wray, for the Attorney-General.*

They cited *Morice v. The Bishop of Durham* (1), *Williams v. Kershaw* (2), *Ellis v. Selby* (3), *James v. Allen* (4), [and other cases].

THE MASTER OF THE ROLLS :

The question arising upon this will is, whether the trustees are bound to apply the fund wholly to a charitable purpose, for, to make it valid, it must, according to the decisions, be obligatory on them. It is not a question whether the trustees may apply it to a charitable purpose, but whether, by the words of the will, they are bound

(1) 7 R. R. 232 (10 Ves. 522).

(3) 43 R. R. 188 (1 My. & Cr. 286).

(2) 42 R. R. 269 (5 Cl. & Fin.

(4) 17 R. R. 4 (3 Mer. 17).

to do so. The decisions go to this further extent, that they must have no option between a charitable and any other purpose.

KENDALL  
v.  
GRANGER.

This Court has adopted a very narrow construction in deciding what is to be deemed a charitable purpose. It must be either one of those purposes denominated charitable in the statute of Elizabeth, or one of such purposes as the Court construes to be charitable, by analogy to those mentioned in that statute. The difficulties always arise from the vagueness of the language used by testators. There is no charitable purpose which is not a benevolent \*purpose, and yet, a trust to apply funds to a benevolent purpose has been held not to be a charitable trust, on the ground that there are benevolent purposes which the Court cannot construe to be charitable purposes; and the trustees, being directed to apply it to benevolent purposes, may apply it to benevolent purposes which are not charitable, according to that narrow construction. So it is also with the word "liberality," which is perhaps more vague, for persons may take very different views of what is or is not liberality. In this case the direction is to apply this fund "for the relief of domestic distress, assisting indigent but deserving individuals." I confess, in my view, that if the sentence had ended here, I should have said that this was a good charitable purpose; for its object is to relieve distress by assisting indigent but deserving individuals, and that would be a valid charitable purpose because of the word "indigent;" but the testator goes on to say "or encouraging undertakings of general utility, in such mode and proportions as their own discretion may suggest, irresponsible to any person or persons whomsoever." Now a charitable purpose may very well, I conceive, be a purpose of general utility; but the question, which seems to me to arise in this case, as in the case of a gift to benevolent purposes, is, are all purposes of general utility necessarily such purposes as this Court deems to be charitable? I own, that in my opinion, according to the decisions which have taken place in this Court, they are not. The words "general utility" are so large, that they comprehend purposes which are not charitable, and, comprising purposes which are not charitable, the trustees have an option to apply them to purposes which are not charitable, and consequently to divert the trust-fund from those purposes which this Court is in the habit of considering charitable.

[ \*303 ]

I do not venture to say that I am well satisfied with all the decisions that have taken place on this subject. I think that there

[ 304 ]

KENDALL  
v.  
GRANGER.

are older cases, showing perhaps that the Court would, in a case where charitable purposes were mentioned, have taken care that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose.

1842.  
July 22.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 304 ]

## RICHARDS v. COOPER.

(5 Beav. 304.)

A second mortgagee can sustain a bill of foreclosure against the mortgagor and subsequent mortgagees, without making the first mortgagee a party.

THE plaintiff, who was the second mortgagee of some property, filed his bill of foreclosure against the assignees of the mortgagor, and the mortgagees subsequent to himself, but without making the first mortgagee a party.

*Mr. Pemberton and Mr. W. James, for the plaintiff.*

*Mr. Bagshawe, for Wood, the fourth mortgagee, objected, that the first mortgagee ought to have been made a party to the suit, for his client was desirous of redeeming, and ought to have the opportunity of redeeming all parties without the necessity of commencing another suit against the first mortgagee.*

THE MASTER OF THE ROLLS overruled the objection, and made the ordinary decree for foreclosure.

1842.  
July 14, 21.  
Nov. 15.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 307 ]

## THE ATTORNEY-GENERAL v. THE CORPORATION OF NEWCASTLE.

(5 Beav. 307—318; S. C. 6 Jur. 789.)

[THIS case is reported on appeal to the House of Lords in 12 Cl. & Fin. 402, to be contained in a later volume of the Revised Reports.]

KELLAWAY *v.* JOHNSON.

(5 Beav. 319—325; S. C. 6 Jur. 751.)

1842.

July 22.

*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 319 ]

Consols were settled to the separate use of the wife for life, with a power to appoint it by will, and the settlement contained a power for the trustees, with the consent in writing of the wife, to alter the securities. The trustees, without such consent, sold the Consols, and invested the produce in Long Annuities, which they afterwards sold and lent the money on bond, which was afterwards received by the husband, who invested it in leaseholds. The wife received the Long Annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the Long Annuities and the subsequent investments had been with her consent. Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the Consols replaced, and that the interest over which the wife had a general power of appointment was not liable to make good the breach of trust.

Since the orders of August, 1841, it is not necessary to make all the persons committing a breach of trust parties to a suit for its restitution.

By the settlement, made on the marriage of Mr. and Mrs. Letts in 1797, a sum of 3,000*l.* Consols was vested in trustees, upon trust for Mrs. Letts for her separate use for life, with remainder to her husband for life, with remainder to the children of the marriage, and if there should be none (which event happened), in trust, as to one half for such persons as Mrs. Letts should by will appoint, and in default for her next of kin.

The settlement contained a power for the trustees, with the consent of Mr. and Mrs. Letts, and the survivor, testified in writing under their hands or hand, to sell the Consols, and invest the produce “upon any other public, or on real security or securities with interest, or in the public stocks or funds, or in the purchase of freehold or copyhold hereditaments;” and from time to time, with such consent and approbation, to alter and transpose the same, and to sell and dispose of the hereditaments so to be purchased; and such hereditaments were to be considered as money, and personal estate.

In 1799 the four trustees sold out the Consols, and the produce, amounting to the sum of 2,040*l.*, was invested in the purchase of 102*l.* Long Annuities.

In February, 1801, the Long Annuities were sold by the trustees, and the produce, amounting to 1,760*l.* 15*s.*, was lent on bond. The bond was afterwards paid, and the amount was received by Mr. Letts.

The dividends on the 3,000*l.* and the Long Annuities, until sold, were received by Mrs. Letts; but no other part of the income, so far as appeared by the evidence, had been received by her.

[ 320 ]

(1) See note, p. 502, *ante*.

KELLAWAY  
JOHNSON.

By an indenture, dated in September, 1801, and executed by and made between Thomas Letts and Esther his wife of the one part, and two of the trustees of the other part, after reciting the sale by the four trustees of the said Long Annuities, at the request and by the consent and approbation of Mr. and Mrs. Letts (testified by their signing and executing that deed), and the placing out the produce thereof, with the like consent and approbation on such bond as aforesaid, and that the said Thomas Letts had received nearly the whole of the monies thereby received, and was desirous of placing out the same in the purchase of leasehold premises, or other personal security to the best advantage he could, and after reciting that he had, with 1,250*l.*, purchased certain leaseholds, Mr. Letts thereby acknowledged the 1,250*l.* was the produce of the trust monies, and that he would, at the request of his wife or the trustees, assign the leaseholds to the trustees; and he covenanted with the trustees that it should be lawful for his wife to receive the rents for her life.

Mrs. Letts died in 1818, without having had any child, having, by her will, appointed her moiety in trust to divide amongst her nephews and nieces, in her will named, including therein the plaintiff Mrs. Kellaway.

[ 321 ]

Mr. Letts died in 1834.

This bill was filed in 1835, by Mr. and Mrs. Kellaway, the limited personal representatives of Mrs. Letts, and claiming under her will, against the representatives of Mr. Letts, the representatives of three out of the four trustees, and the other appointees under the will of Mrs. Letts, seeking to charge the estate of Mr. Letts and the estates of the three trustees with a breach of trust in investing the trust funds in the manner above stated.

*Mr. Pemberton* and *Mr. Dixon* contended that the representatives both of Mr. Letts, and of the three trustees, were bound to replace the moiety of the 3,000*l.* Consols improperly sold out, and invested in funds not warranted by the settlement; and also to pay the amount of the dividends accrued since the death of Mr. Letts, and the costs of the suit. They insisted also that the plaintiffs were entitled to have a lien on the leasehold estate for the amount.

*Kindersley*, *Mr. Cooke*, *Mr. Koe*, *Mr. Ellison*, *Mr. Paynter*, and *Mr. Lorat* for parties in the same

*Mr. George Turner, Mr. Lewis, Mr. Purvis, Mr. Faber, Mr. Tinney, and Mr. Bacon* for the representatives of Letts, and of the three trustees, argued as follows :

KELLAWAY  
JOHNSON.

Mrs. Letts concurred in the selling out of the trust fund, and she had the benefit of it, by receiving the Long Annuities. She afterwards executed a deed detailing the transactions, acknowledging that they had taken place with her consent and approbation, and therefore confirming them. She is to be treated as a *feme sole*, in regard to this property, and having concurred, her \*whole interest is liable to indemnify the defendants. \* \* \*

[ \*322 ]

The property was settled for her separate use, without any restriction against anticipation, which was not the case in *Hockley v. Bantock* (1); and having a general power of appointment, the fund in the hands of her appointees, who are mere volunteers, is subject to her debts and liabilities (2) : *Heatley v. Thomas* (3). \* \* \*

Lastly, no relief can be had on this record, as there is no representative before the Court of Mr. Fixen, one of the trustees, guilty of the breach of trust.

[ 323 ]

*Mr. Pemberton*, in reply :

The trustees had no right to sell out the stock except in the manner authorised by the power, viz. upon an authority in writing. The sale took place without the written authority of the wife, and for an improper purpose, and the acts of concurrence relied on are not binding on a married woman (4).

The 32nd order of August, 1841, renders it unnecessary to make all the trustees parties (5).

#### THE MASTER OF THE ROLLS :

This is a bill filed to make good a breach of trust under the following circumstances. On the marriage of Mr. and Mrs. Letts a settlement was made of a sum of 3,000*l.* Consols, the dividends of which were to be paid to the wife for life for her separate use, with remainder to Mr. Letts, with remainder to the children of the marriage, and if no children, one half of the principal was to go to the husband, and the other half to such persons as the wife should appoint by will, and there was a gift over in default of appointment.

(1) 25 R. R. 16 (1 Russ. 141).

(4) See *Hopkins v. Myall*, 34 R. R.

(2) See *Jenney v. Andrews*, 23 R. R. 25 (2 Russ. & My. 86).

216 (6 Madd. 264).

(5) See *Perry v. Knott*, ante, p. 502.

(3) 10 R. R. 122 (15 Ves. 596).

KELLAWAY

JOHNSON,

[ \*324 ]

here was a power for the trustees, with the consent in writing of the husband and wife, to sell the stock, and invest the produce on public or real securities, or securities at interest, or in the public \*stocks or funds, or in the purchase of freehold or copyhold hereditaments. The stock was sold out, not for any of the purposes mentioned in the settlement, but for the purpose of applying it in the purchase of 102*l.* Long Annuities. In February, 1801, these Long Annuities were sold for 1,760*l.* 15*s.* This money, instead of being invested in any of the securities pointed out, was lent on bond; and the bond was afterwards paid off, and Mr. Letts, who received the money, applied it in the purchase of a leasehold estate.

A more clear breach of trust was never committed. The wife afterwards executed the deed of 1801, which did not bind her, because she was induced by the husband, who had the benefit of the breach of trust, to execute this deed. The wife by her will executed the power, and the plaintiffs are entitled under the will. She died in 1818, having had no children and she left her husband surviving. He died on the 26th of February, 1834, and his executors are the first named defendants on this record. The question is, if the representatives of Mr. Letts and the trustees who concurred are not answerable; and it is clear that the trustees are answerable, together with the representatives of Mr. Letts, who had the benefit of the breach of trust. If the stock had not been improperly sold out for an improper purpose, there would have been no loss or diminution of the trust fund. All the trustees were parties to it; all the trustees concurred in selling the Long Annuities; and each and every of them is answerable for any future loss, the root and cause of such loss being the original selling out of the stock. The estates of the trustees, therefore, are all liable; the stock must be replaced with the dividends since the death of Letts. The leasehold estate, in the purchase of which the trust fund was invested, still exists, and the plaintiffs have a right to make it available to satisfy the breach of trust.

[ 325 ]

I think it is not necessary to have all the persons liable before the Court; for under the new orders, if one trustee only was present, I should make a decree against him, leaving him to seek contribution from the other trustees (1).

It was declared that the estates of Letts and of the trustees were liable to replace one moiety of the 3,000*l.* Consols, and to make

(1) See note, p. 502, *ante*.

good the dividends accrued since the death of Mr. Letts, and to pay the costs of the suit; and it was declared that the leasehold estate and the rents received since the death of Mr. Letts, were specifically liable to the claim of the appointees of Mrs. Letts.

KELLAWAY  
r.  
JOHNSON.

## WILLIAMS v. WENTWORTH (1).

(5 Beav. 325—329.)

1842.  
July 20, 21.  
Aug. 1.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 325 ]

The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, for monies expended for the necessary protection of his person and estate.

Under a commission of lunacy, A. B. was, upon inquisition, found lunatic, and the verdict was confirmed upon the trial of a traverse. Before the costs had been ordered to be raised A. B. died: Held, that under the 3 & 4 Will. IV. c. 104, the real estate of the lunatic was liable for the costs of the proceedings.

In this case, the plaintiff, representing himself to be a creditor of Charles Henry Tubb deceased, filed his bill, on behalf of himself and all other the creditors of the same person, to obtain payment of his and the other debts out of the real and personal estate of the debtor. The heir-at-law put in a demurrer to the bill, and alleged that upon the bill it did not appear that the plaintiff was a creditor.

The case was this: Charles Henry Tubb was a lunatic; the plaintiff petitioned for a commission of lunacy, which was duly issued. Upon the inquisition, a verdict of lunacy was obtained, and upon the trial of a traverse, \*was confirmed. By an order of the LORD CHANCELLOR, it was referred to the Master to tax the costs: to inquire what fund there was for payment, and if no fund, whether it would be proper to raise the amount by sale or mortgage of the real estate. Pending the proceedings before the Master, the lunatic died; and the LORD CHANCELLOR, acting under his jurisdiction in lunacy, had no longer power to raise the costs by sale or mortgage of the lunatic's estate, but under an order afterwards made, the costs were taxed at the sum of 1,168*l.* 16*s.* 8*d.* The Master's report was confirmed, and by an order, made by the LORD CHANCELLOR "in the matter of the lunacy," it was declared that the costs had been properly incurred for the benefit of the lunatic, and the bill also alleged, that they were necessary for the protection of the person and estate of the lunatic.

[ \*326 ]

(1) *In re Rhodes* (1889) 44 Ch. Div. 94, 59 L. J. Ch. 298, 62 L. T. 342.



WILLIAMS  
v.  
WENT-  
WORTH.

*Mr. Kindersley and Mr. Dixon, for the heir-at-law, in support of the demurrer :*

The plaintiff has no valid demand as against the real estate of the lunatic. He must rest his claim on the 3 & 4 Will. IV. c. 104, which makes the real estate of persons "assets to be administered in courts of equity for the payment of the just debts of such person, as well debts due on simple contract as on specialty." This is not a debt on specialty: if it were, it would be plainly invalid, being created by a lunatic; is it then a debt on simple contract? Now this claim is not in the ordinary use of the term a "debt" at all; nor is it possible that any contract could be entered into between the lunatic and the plaintiff. It would be extraordinary indeed, if a stranger by his voluntary interference could charge the heir. [They cited *Carter v. Beard* (1).]

[ 327 ] Upon the death of the lunatic, the LORD CHANCELLOR had no longer the power to charge the estate, which then became the estate of the heir, and was not the estate of the lunatic.

*Mr. Pemberton, Mr. G. Turner, and Mr. Willcock, in support of the bill :*

\* \* In *Howard v. Lord Digby* (2), Lord BROUGHAM considered a lunatic was as liable for money paid to his use for necessaries, &c., as a person of sound mind, for otherwise he might be left destitute. \* \* \*

[ 328 ] In *Carter v. Beard*, the VICE-CHANCELLOR OF ENGLAND conceived that the expenditure by the lunatic's stepfather beyond the rents, for the maintenance of the lunatic, "was an act of bounty," and that the funeral expenses were "not a debt contracted by the lunatic;" in fact, that they could not constitute a debt of the deceased party, as they were not due at his death.

The words "simple contract" comprise an implied contract as well as any other.

The personal estate of the lunatic would formerly have been liable to this demand, and now, by the statute, the real estate is equally liable. \* \* \*

[ 329 ] *Mr. Kindersley, in reply.*

THE MASTER OF THE ROLLS :

I will consider this case.

(1) 51 R. R. 204 (10 Sim. 7).

(2) 37 R. R. 276 (2 Cl. & Fin. 634).

## THE MASTER OF THE ROLLS :

It was argued in this case, that however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted ; but I am of opinion that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate, and that under the circumstances of this case, a debt was constituted, and that payment of it may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic, may well be subject to question and consideration ; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to,—that a man shall not be allowed to stultify himself.

*Overrule the demurrer.*

HOTHAM *v.* SOMERVILLE.

(5 Beav. 360—372 ; S. C. 6 Jur. 861.)

F. and W., as solicitors for the tenant for life, held the title deeds which afterwards passed into the possession of W. and C., their successors. The tenant for life died, and the estate then stood limited, first, to F. and W. for 500 years to secure a sum of 2,000*l.*, with remainder to trustees for 600 years to secure a jointure and portions, with remainder to A. B. in tail.

A. B. being an infant, a suit was instituted on his behalf, in which the 2,000*l.* was raised on the security of the term. Upon that occasion, F. and W. covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them ; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the Court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. and C. were solicitors in the suit for A. B.

A. B., upon coming of age, presented a petition for the delivery of the title deeds. Held, that (independently of the covenant) W. and C. held the deeds for A. B., and not for the termors, but the covenant having been entered into for the benefit of the infant, F. and W. were not bound to part with the deeds, until released from their covenant. Held also, that

WILLIAMS

WENT-  
WORTH.  
*Aug. 1.*

1842.

*July 9.*  
*Aug. 4.*

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 360 ]

HOTHAM  
v.  
SOMERVILLE.

W. was not entitled to hold the deeds for the trustees of the term of 600 years, or for any costs other than those of seeing himself properly released from the covenant, and that he had no right to require them to be delivered to the receiver in the cause.

THE circumstances of this case are fully detailed in the judgment of the COURT.

*Mr. Pemberton* and *Mr. Glasse*, for the petitioner William B. Hotham.

*Mr. Kindersley* and *Mr. Faber*, for other parties supported the petition.

*Mr. Bigg*, for Mr. Fulwer Craven.

*Mr. Tinney* and *Mr. Hallett*, for Mr. White, in opposition.

*Mr. Pemberton*, in reply.

#### THE MASTER OF THE ROLLS :

This petition prays that the respondent may deliver up certain deeds and documents to the solicitor of the petitioner.

In the year 1808, the estate to which the petitioner is entitled, was, under the authority of an Act of Parliament, purchased and conveyed to William Hotham of Bognor, William Hotham of York, and Jane Cowan, in \*fee, in trust for the then subsisting uses of the will of Sir Richard Hotham : viz., to the use of William Hotham of Bognor for life, with remainder to the use of the first son of the same William Hotham in tail, with other remainders over, and there was power, enabling the tenant for life to secure a jointure for his widow, and portions for his younger children.

On the occasion of this purchase, the title deeds of the estate were delivered to Messrs. White and Fownes, as the solicitors of William Hotham of Bognor, the tenant for life.

In the year 1809, William Hotham of Bognor, in pursuance of arrangements made on his marriage in 1807, executed deeds, whereby he granted an annuity, by way of jointure, to his wife, and charged the estate with portions for his younger children ; but the wife having died in October, 1810, leaving a daughter Jane Marianne, the only issue of the marriage, the deed ceased to have any operation.

Jane Cowan, one of the trustees named in the Act of Parliament, having died before the year 1819, Mr. Fownes, one of the solicitors

of William Hotham of Bognor, was appointed a trustee in her place, and deeds were executed in the month of February, 1819, whereby the estate, formerly vested in William Hotham of Bognor, William Hotham of York, and Jane Cowan was conveyed to William Hotham of Bognor, William Hotham of York, and James Somerville Fownes (1). HOTHAM  
v.  
SOMERVILLE

The deeds had passed from the possession of White and Fownes into the possession of Fownes and White, \*who had succeeded to their business, and were held by Fownes and White as the solicitors of William Hotham of Bognor. [ \*362 ]

William Hotham of Bognor was about to marry again ; previously to his doing so, and in order to make provision for his daughter and only child of his first marriage, and to provide a jointure for his intended wife, and portions for the younger children of his second marriage, he, by an indenture dated the 26th day of February, 1819, charged the estate with the sum of 2,000*l.*, as the portion of his daughter Jane Marianne ; and pursuant to his power, and for better securing the payment of the 2,000*l.*, he demised the estate to James Somerville Fownes and Richard Samuel White, for the term of 500 years, on trust to raise the 2,000*l.*, with a proviso for the cesser of the term when the trusts should be performed.

By this deed Messrs. Fownes and White, who were the solicitors of William Hotham of Bognor, and who held the deeds for him, became the trustees of the term of 500 years, for securing payment of the daughter's portion ; but the acceptance of the trust did not vary the custody, which remained, as before, in the hands of Fownes and White, as the solicitors of William Hotham of Bognor.

In pursuance of arrangements made on the second marriage of William Hotham of Bognor, a deed, dated the 20th of March, 1819, was prepared. It was not executed till some years afterwards, when circumstances had in some respects changed. The effect ultimately was to secure a jointure of 60*l.* a year to the second wife, and portions for the younger children of the second marriage ; and for these purposes, a term of 600 years was vested in Henry Usborne and Fulwer Craven, \*in trust to secure the jointure and the portions subject to prior charges. [ \*363 ]

Of the second marriage there were three children, the petitioner William Beaumont Hotham, Richard Henry a younger son, and Georgiana an only daughter ; and, under these circumstances, the estate, subject to a fee-farm rent, stood limited to William Hotham

(1) He afterwards took the name of Somerville.

KENDALL  
v.  
GRANGER.

are older cases, showing perhaps that the Court would, in a case where charitable purposes were mentioned, have taken care that the application should have been made to those purposes; but I do not feel myself at liberty to depart from the decisions which have been made on that subject. Conceiving myself bound by authority, I must declare that this is not a trust which can be carried into effect as a charitable purpose.

1842.  
July 22.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 304 ]

## RICHARDS v. COOPER.

(5 Beav. 304.)

A second mortgagee can sustain a bill of foreclosure against the mortgagor and subsequent mortgagees, without making the first mortgagee a party.

THE plaintiff, who was the second mortgagee of some property, filed his bill of foreclosure against the assignees of the mortgagor, and the mortgagees subsequent to himself, but without making the first mortgagee a party.

*Mr. Pemberton and Mr. W. James, for the plaintiff.*

*Mr. Bagshawe, for Wood, the fourth mortgagee, objected, that the first mortgagee ought to have been made a party to the suit, for his client was desirous of redeeming, and ought to have the opportunity of redeeming all parties without the necessity of commencing another suit against the first mortgagee.*

THE MASTER OF THE ROLLS overruled the objection, and made the ordinary decree for foreclosure.

1842.  
July 14, 21.  
Nov. 15.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 307 ]

## THE ATTORNEY-GENERAL v. THE CORPORATION OF NEWCASTLE.

(5 Beav. 307—318; S. C. 6 Jur. 789.)

[THIS case is reported on appeal to the House of Lords in 12 Cl. & Fin. 402, to be contained in a later volume of the Revised Reports.]

## KELLAWAY v. JOHNSON.

(5 Beav. 319—325; S. C. 6 Jur. 751.)

1842.  
July 22.*Rolls Court.*Lord  
LANGDALE,  
M.R.

[ 319 ]

Consols were settled to the separate use of the wife for life, with a power to appoint it by will, and the settlement contained a power for the trustees, with the consent in writing of the wife, to alter the securities. The trustees, without such consent, sold the Consols, and invested the produce in Long Annuities, which they afterwards sold and lent the money on bond, which was afterwards received by the husband, who invested it in leaseholds. The wife received the Long Annuities until sold, and afterwards joined her husband in executing a deed, reciting that the sale of the Long Annuities and the subsequent investments had been with her consent. Held, that the appointees of the fund under her will were entitled, as against the husband and trustees, to have the Consols replaced, and that the interest over which the wife had a general power of appointment was not liable to make good the breach of trust.

Since the orders of August, 1841, it is not necessary to make all the persons committing a breach of trust parties to a suit for its restitution.

By the settlement, made on the marriage of Mr. and Mrs. Letts in 1797, a sum of 3,000*l.* Consols was vested in trustees, upon trust for Mrs. Letts for her separate use for life, with remainder to her husband for life, with remainder to the children of the marriage, and if there should be none (which event happened), in trust, as to one half for such persons as Mrs. Letts should by will appoint, and in default for her next of kin.

The settlement contained a power for the trustees, with the consent of Mr. and Mrs. Letts, and the survivor, testified in writing under their hands or hand, to sell the Consols, and invest the produce "upon any other public, or on real security or securities with interest, or in the public stocks or funds, or in the purchase of freehold or copyhold hereditaments;" and from time to time, with such consent and approbation, to alter and transpose the same, and to sell and dispose of the hereditaments so to be purchased; and such hereditaments were to be considered as money, and personal estate.

In 1799 the four trustees sold out the Consols, and the produce, amounting to the sum of 2,040*l.*, was invested in the purchase of 102*l.* Long Annuities.

In February, 1801, the Long Annuities were sold by the trustees, and the produce, amounting to 1,760*l.* 15*s.*, was lent on bond. The bond was afterwards paid, and the amount was received by Mr. Letts.

The dividends on the 3,000*l.* and the Long Annuities, until sold, were received by Mrs. Letts; but no other part of the income, so far as appeared by the evidence, had been received by her.

[ 320 ]

(1) See note, p. 502, *ante*.

KELLAWAY  
v.  
JOHNSON.

By an indenture, dated in September, 1801, and executed by and made between Thomas Letts and Esther his wife of the one part, and two of the trustees of the other part, after reciting the sale by the four trustees of the said Long Annuities, at the request and by the consent and approbation of Mr. and Mrs. Letts (testified by their signing and executing that deed), and the placing out the produce thereof, with the like consent and approbation on such bond as aforesaid, and that the said Thomas Letts had received nearly the whole of the monies thereby received, and was desirous of placing out the same in the purchase of leasehold premises, or other personal security to the best advantage he could, and after reciting that he had, with 1,250*l.*, purchased certain leaseholds, Mr. Letts thereby acknowledged the 1,250*l.* was the produce of the trust monies, and that he would, at the request of his wife or the trustees, assign the leaseholds to the trustees; and he covenanted with the trustees that it should be lawful for his wife to receive the rents for her life.

Mrs. Letts died in 1818, without having had any child, having, by her will, appointed her moiety in trust to divide amongst her nephews and nieces, in her will named, including therein the plaintiff Mrs. Kellaway.

[ 321 ]

Mr. Letts died in 1834.

This bill was filed in 1835, by Mr. and Mrs. Kellaway, the limited personal representatives of Mrs. Letts, and claiming under her will, against the representatives of Mr. Letts, the representatives of three out of the four trustees, and the other appointees under the will of Mrs. Letts, seeking to charge the estate of Mr. Letts and the estates of the three trustees with a breach of trust in investing the trust funds in the manner above stated.

*Mr. Pemberton* and *Mr. Dixon* contended that the representatives both of Mr. Letts, and of the three trustees, were bound to replace the moiety of the 3,000*l.* Consols improperly sold out, and invested in funds not warranted by the settlement; and also to pay the amount of the dividends accrued since the death of Mr. Letts, and the costs of the suit. They insisted also that the plaintiffs were entitled to have a lien on the leasehold estate for the amount.

*Mr. Kindersley*, *Mr. Cooke*, *Mr. Koe*, *Mr. Ellison*, *Mr. Lloyd*, *Mr. Paynter*, and *Mr. Lovat* for parties in the same interest, and

*Mr. George Turner, Mr. Lewis, Mr. Purvis, Mr. Faber, Mr. Tinney, and Mr. Bacon* for the representatives of Letts, and of the three trustees, argued as follows : KELLAWAY  
r.  
JOHNSON.

Mrs. Letts concurred in the selling out of the trust fund, and she had the benefit of it, by receiving the Long Annuities. She afterwards executed a deed detailing the transactions, acknowledging that they had taken place with her consent and approbation, and therefore confirming them. She is to be treated as a *feme sole*, in regard to this property, and having concurred, her \*whole [ \*322 ] interest is liable to indemnify the defendants. \* \* \*

The property was settled for her separate use, without any restriction against anticipation, which was not the case in *Hockley v. Bantock* (1); and having a general power of appointment, the fund in the hands of her appointees, who are mere volunteers, is subject to her debts and liabilities (2) : *Heatley v. Thomas* (3). \* \* \*

Lastly, no relief can be had on this record, as there is no representative before the Court of Mr. Fixen, one of the trustees, guilty of the breach of trust. [ 323 ]

*Mr. Pemberton*, in reply :

The trustees had no right to sell out the stock except in the manner authorised by the power, viz. upon an authority in writing. The sale took place without the written authority of the wife, and for an improper purpose, and the acts of concurrence relied on are not binding on a married woman (4).

The 32nd order of August, 1841, renders it unnecessary to make all the trustees parties (5).

#### THE MASTER OF THE ROLLS :

This is a bill filed to make good a breach of trust under the following circumstances. On the marriage of Mr. and Mrs. Letts a settlement was made of a sum of 3,000*l.* Consols, the dividends of which were to be paid to the wife for life for her separate use, with remainder to Mr. Letts, with remainder to the children of the marriage, and if no children, one half of the principal was to go to the husband, and the other half to such persons as the wife should appoint by will, and there was a gift over in default of appointment.

(1) 25 R. R. 16 (1 Russ. 141).

(4) See *Hopkins v. Myall*, 34 R. R.

(2) See *Jenny v. Andrews*, 23 R. R. 25 (2 Russ. & My. 86).

216 (6 Madd. 264).

(5) See *Perry v. Knott*, ante, p. 502.

(3) 10 R. R. 122 (15 Ves. 596).



KELLAWAY  
v.  
JOHNSON.

[ \*324 ]

here was a power for the trustees, with the consent in writing of the husband and wife, to sell the stock, and invest the produce on public or real securities, or securities at interest, or in the public \*stocks or funds, or in the purchase of freehold or copyhold hereditaments. The stock was sold out, not for any of the purposes mentioned in the settlement, but for the purpose of applying it in the purchase of 102*l.* Long Annuities. In February, 1801, these Long Annuities were sold for 1,760*l.* 15*s.* This money, instead of being invested in any of the securities pointed out, was lent on bond ; and the bond was afterwards paid off, and Mr. Letts, who received the money, applied it in the purchase of a leasehold estate.

A more clear breach of trust was never committed. The wife afterwards executed the deed of 1801, which did not bind her, because she was induced by the husband, who had the benefit of the breach of trust, to execute this deed. The wife by her will executed the power, and the plaintiffs are entitled under the will. She died in 1818, having had no children and she left her husband surviving. He died on the 26th of February, 1834, and his executors are the first named defendants on this record. The question is, if the representatives of Mr. Letts and the trustees who concurred are not answerable ; and it is clear that the trustees are answerable, together with the representatives of Mr. Letts, who had the benefit of the breach of trust. If the stock had not been improperly sold out for an improper purpose, there would have been no loss or diminution of the trust fund. All the trustees were parties to it ; all the trustees concurred in selling the Long Annuities ; and each and every of them is answerable for any future loss, the root and cause of such loss being the original selling out of the stock. The estates of the trustees, therefore, are all liable ; the stock must be replaced with the dividends since the death of Letts. The leasehold estate, in the purchase of which the trust fund was invested, still exists, and the plaintiffs have a right to make it available to satisfy the breach of trust.

[ 325 ]

I think it is not necessary to have all the persons liable before the Court ; for under the new orders, if one trustee only was present, I should make a decree against him, leaving him to seek contribution from the other trustees (1).

It was declared that the estates of Letts and of the trustees were liable to replace one moiety of the 3,000*l.* Consols, and to make

(1) See note, p. 502, *ante*.

good the dividends accrued since the death of Mr. Letts, and to pay the costs of the suit; and it was declared that the leasehold estate and the rents received since the death of Mr. Letts, were specifically liable to the claim of the appointees of Mrs. Letts.

KELLAWAY  
v.  
JOHNSON.

## WILLIAMS v. WENTWORTH (1).

(5 Beav. 325—329.)

The law will raise an implied contract, and give a valid demand or debt against the lunatic or his estate, for monies expended for the necessary protection of his person and estate.

Under a commission of lunacy, A. B. was, upon inquisition, found lunatic, and the verdict was confirmed upon the trial of a traverse. Before the costs had been ordered to be raised A. B. died: Held, that under the 3 & 4 Will. IV. c. 104, the real estate of the lunatic was liable for the costs of the proceedings.

1842.  
July 20, 21.  
Aug. 1.

*Rolls Court.*

LORD  
LANGDALE,  
M.R.

[ 325 ]

In this case, the plaintiff, representing himself to be a creditor of Charles Henry Tubb deceased, filed his bill, on behalf of himself and all other the creditors of the same person, to obtain payment of his and the other debts out of the real and personal estate of the debtor. The heir-at-law put in a demurrer to the bill, and alleged that upon the bill it did not appear that the plaintiff was a creditor.

The case was this: Charles Henry Tubb was a lunatic; the plaintiff petitioned for a commission of lunacy, which was duly issued. Upon the inquisition, a verdict of lunacy was obtained, and upon the trial of a traverse, \*was confirmed. By an order of the LORD CHANCELLOR, it was referred to the Master to tax the costs: to inquire what fund there was for payment, and if no fund, whether it would be proper to raise the amount by sale or mortgage of the real estate. Pending the proceedings before the Master, the lunatic died; and the LORD CHANCELLOR, acting under his jurisdiction in lunacy, had no longer power to raise the costs by sale or mortgage of the lunatic's estate, but under an order afterwards made, the costs were taxed at the sum of 1,168*l.* 16*s.* 8*d.* The Master's report was confirmed, and by an order, made by the LORD CHANCELLOR "in the matter of the lunacy," it was declared that the costs had been properly incurred for the benefit of the lunatic, and the bill also alleged, that they were necessary for the protection of the person and estate of the lunatic.

[ \*326 ]

(1) *In re Rhodes* (1889) 44 Ch. Div. 94, 59 L. J. Ch. 298, 62 L. T. 342.

HOTHAM  
v.  
SOMERVILLE.  
[ \*372 ]

If an order is required, I think that it should be that Messrs. White do deliver up the deeds to the plaintiff, \*or such person as he shall appoint, upon Messrs. Fownes and White being satisfied that the plaintiff, or such other person, has entered into a good and valid covenant to the satisfaction of the mortgagees, for the production of the deeds, according to the intent of the deed of covenant of the 9th of June, 1838.

1842.  
Nov. 21.

### LEE v. READ.

(5 Beav. 381—387; S. C. 12 L. J. Ch. 26; 6 Jur. 1026.)

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 381 ]

A defendant is not bound to discover the principal fact, or any one of a long series or chain of facts, which may contribute to establish a criminal charge against himself, and he cannot waive this right by any agreement.

Pending the proceedings in the cause, the plaintiff indicted the defendants in respect of the same transactions. The time for answering was extended until after the trial of the indictment.

IN October, 1840, the plaintiff mortgaged a vessel called the *Pearl* to the defendants for 196*l.*, and in April, 1842, the defendants took possession of the vessel.

According to the plaintiff's representations, the defendants, having taken possession, proceeded to cut her in half, and to lengthen her, and to make other considerable alterations and repairs; but, according to the defendants' case, they broke her up, and employed part of the materials in building another ship, which they called the *Lightning*.

The plaintiff filed this bill for redemption in August, 1842, insisting that the two vessels were identical. The bill charged "that with a view to obtain the registry of the ship called the *Lightning* in the names \*of the defendants, they made divers written and other statements and representations to the Custom House officers or clerks, or other persons to whom such application for registry was made, respecting the ship now called the *Lightning*, and particularly respecting the registering of the said ship; and they thereby stated and represented (amongst other things) that the said ship or vessel was an entirely new vessel, and that the defendants were absolute owners thereof, or to that effect; and they also made other representations, with a view to induce the officers or clerks to register the said ship or vessel by the name of the *Lightning*, and in the names of the defendants as the absolute owners thereof. The plaintiff charged that all such statements and

## THE MASTER OF THE ROLLS :

It was argued in this case, that however beneficial to the lunatic, the expenditure may have been, yet, as the lunatic was incapable of contracting, no debt could be constituted; but I am of opinion that in the case of money expended for the necessary protection of the person and estate of the lunatic, the law will raise an implied contract, and give a valid demand or debt, against the lunatic or his estate, and that under the circumstances of this case, a debt was constituted, and that payment of it may be obtained out of the real estate, if the personal estate be insufficient. Any other conclusion would, as it appears to me, be extremely dangerous, as well as contrary to the principles upon which several cases have been decided. That which is necessary for the protection of the person and estate of the lunatic, may well be subject to question and consideration; but when a demand is made in respect of a necessary of that kind, I do not see how it is to be distinguished, in principle, from a demand arising in respect of the supply of food and clothing. A debt is constituted by reason of a contract, which, in such cases, the law will supply, and it rests, as I conceive, upon a far better foundation than the rule which has sometimes been referred to,—that a man shall not be allowed to stultify himself.

*Overrule the demurrer.*

HOTHAM *v.* SOMERVILLE.

(5 Beav. 360—372; S. C. 6 Jur. 861.)

F. and W., as solicitors for the tenant for life, held the title deeds which afterwards passed into the possession of W. and C., their successors. The tenant for life died, and the estate then stood limited, first, to F. and W. for 500 years to secure a sum of 2,000*l.*, with remainder to trustees for 600 years to secure a jointure and portions, with remainder to A. B. in tail.

A. B. being an infant, a suit was instituted on his behalf, in which the 2,000*l.* was raised on the security of the term. Upon that occasion, F. and W. covenanted with the mortgagees to produce the title deeds from time to time, and not to part with them; but they were relievable from the covenant on certain terms. A receiver was appointed in the suit, and the Court directed the costs of the solicitors of the suit to remain charges upon the estate at interest. W. and C. were solicitors in the suit for A. B.

A. B., upon coming of age, presented a petition for the delivery of the title deeds. Held, that (independently of the covenant) W. and C. held the deeds for A. B., and not for the termors, but the covenant having been entered into for the benefit of the infant, F. and W. were not bound to release them from their covenant. Held also, that

WILLIAMS

WENT-  
WORTH.  
*Aug. 1.*

1842.

July 9.

Aug. 4.

Rolls Court.

Lord  
LANGDALE,  
M.R.

[ 360 ]

LEE  
v.  
READ.

defendants' solicitors replied, " We agree to the defendants having fourteen days further time to put in their answer, and that it shall be peremptory."

[ \*384 ]

On the 14th of November, the defendants applied to the Master for a fortnight's time, to put in their answer \*after the indictment for conspiracy had been disposed of, which the Master refused to grant, on the ground of the peremptory undertaking. It was now moved on behalf of the defendants, that they might have a fortnight's time to answer after the trial of the indictment.

*Mr. Pemberton and Mr. Rogers*, in support of the motion :

The defendants went before the Commissioners in pursuance of the order of the Court, and the plaintiff thereupon, on his own evidence, indicted all the parties, not for perjury but conspiracy. Having thought fit to proceed criminally against the defendants, he has no right to enforce an answer which may tend to criminate them. If the proceedings be not stayed in the mean time, the defendants, who cannot answer the bill without furnishing some admissions affecting the criminal charge, must decline to answer, and they will thus be deprived of the opportunity of making a defence in support of their civil rights.

*Mr. Kindersley and Mr. Dixon*, *contrà* :

The peremptory undertaking prevents the Court granting any indulgence. The defendants might at least answer such parts of the bill as do not tend to criminate them ; and under the New Orders (1), they may object by answer to discover the rest. The defendants cannot set up their own criminality, as a reason for depriving the plaintiff of his civil rights.

THE MASTER OF THE ROLLS :

The only question is as to the form of the application.

*Mr. Pemberton*, in reply.

[ 385 ]

THE MASTER OF THE ROLLS :

As to the principle upon which the Court acts in these cases, there is, I apprehend, no doubt whatever. A defendant is not to be called upon to discover the principal fact, or any one of a long series or chain of facts which may contribute to establish a criminal

LEE  
v.  
READ.

charge against himself. He may protect himself by demurrer, plea, or answer, or in any way in which he can bring the matter fairly under the consideration of the Court. It being a right to protection given to him by the law, I apprehend he cannot, by any agreement, deprive himself of the benefit of it. The point comes before me rather suddenly this morning; but I think I recollect a case in which it was held that a defendant cannot make an agreement by which he is to deprive himself of that right to protection which by law he is entitled to. If that be so, he might, under his hand and seal, have covenanted to put in a full and perfect answer to every interrogatory, and yet, after having done that, he might claim the protection of the law of this Court, in respect of the discovery required of him. To what extent that may go, it is not necessary for me to state upon the present occasion; because all that has happened here is, that after the indictment was preferred, the defendants obtained an enlargement of the time, which they agreed should be peremptory. For any thing I can see here,—for any thing that has been argued or alleged to the contrary,—there is not one fact in this bill which must not necessarily be proved at the hearing of that indictment. It has been argued that possibly it might not be so; but all the facts stated both in the original and amended bill, so far as I have heard them, are facts which constitute part of the narrative, and of that statement of circumstances which must necessarily be brought before the jury upon a trial.

Now if this be so, the defendants might undoubtedly protect themselves in this suit, by stating that there was a criminal prosecution pending against them, and that they could not answer any one of the facts stated in this bill, without contributing towards the establishment of that criminal charge. The question is, whether, under the circumstances of the case, they are at all bound to do that; and I cannot agree with the plaintiff's counsel that the rule laid down in these cases must be extended to any case whatever, or that we shall have defendants coming here every day and asking an enlarged time to answer, because, forsooth, there might be some criminal charge at the same time brought, or about to be brought, the prosecution of which would be facilitated by the discovery made to the bill. That is not the case here. The case is that an indictment has been actually preferred since the commencement of the proceedings here pending, and at the very time the defendants are called upon to put in an answer.

[ 386 ]

LEE  
C.  
READ.

which must necessarily discover those very matters which will be in issue at the trial. The only hesitation I have had in the course of these proceedings is, as to the form of the order; and I think that, considering the very peculiar circumstances of the case, the time when this indictment was preferred, and the circumstances which must of necessity be substantiated in it, I shall not do wrong in granting this motion in the form now asked.

With respect to costs, that which has happened is very material. I think that the party ought to have applied for protection at a much earlier period; and I think I cannot grant this motion without making the defendants not only pay the costs of it, but of the applications to the Master, and any other costs which have been incurred in the negotiation for further time. I think the defendants ought to pay those costs; and upon their paying those costs, let this motion be granted.

[ 387 ]

There are many authorities upon this subject, which, if it had been necessary to establish the principle at all, it would have been very material to have gone into. They are very important, and cases have occurred, I think before myself, in which I have had to look very minutely through every interrogatory in the bill, for the purpose of discovering whether there was any interrogatory which could be answered without having a bearing upon a criminal charge. I have been obliged to do so on more than one occasion; and if this had come on in the ordinary course, I might have been compelled to do so here, and I certainly should not have hesitated to perform that part of my duty. The circumstances under which the indictment was preferred, and the fact of its being now pending, are my reasons for making this particular order.

1842.  
Nov. 24.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 388 ]

### ROBINSON v. WOOD (1).

(5 Beav. 388—389; S. C. 12 L. J. Ch. 93.)

A judgment having been obtained against a party to whom a sum standing to the credit of the cause had been ordered to be paid, the Court, on the application of the judgment creditor, stayed the delivery to the debtor of the Accountant-General's cheques.

THE defendant, Thomas Wood, was entitled to one-sixth of the residuary estate of the testator in the cause, which, in June, 1842, had been ordered to be paid to him.

This share consisted of two sums of 211*l.* 17*s.* 5*d.* and

(1) *Harris v. Beauchamp Brothers* [1894] 1 Q. B. 801, 63 L. J. Q. B. 480.

1,103*l.* 16*s.* 6*d.* cash, the produce of stock standing to the credit of the cause; and for the payment of which the Accountant-General had prepared cheques on the Bank of England.

ROBINSON  
v.  
WOOD.

The petitioners, Charles Wade and John Pavier, had, in June, 1841, obtained a judgment against Thomas Wood, in the Common Pleas, for the sum of 2,500*l.* They caused it to be duly entered, and in November, 1842, they issued a *fi. fa.*, which was delivered to the sheriff of Middlesex, who, under the 1 & 2 Vict. c. 110, sought to seize the cheques in the hands of the Accountant-General.

The petition prayed that the Accountant-General might be ordered not to deliver to Thomas Wood, or his solicitor or agent, the cheques drawn and signed by the Accountant-General, or any other cheques for the said sums of 211*l.* 17*s.* 5*d.* and 1,103*l.* 16*s.* 6*d.*, or either of them or any part thereof, without the authority of the petitioners; and that the Accountant-General might be ordered to deliver the said cheques to the petitioners or to the sheriff of Middlesex.

*Mr. Pemberton* and *Mr. Parry*, in support of the petition, referred to the 1 & 2 Vict. c. 110, s. 12, and 3 & 4 Vict. c. 82.

[ 389 ]

The defendant did not appear.

The MASTER OF THE ROLLS considered the petitioners entitled to the first part of the prayer of the petition, staying the delivery of the cheques, and he gave leave to mention the case as to the other part of the prayer of the petition, which he did not now finally dispose of.

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## GARDNER v. DANGERFIELD.

(5 Beav. 389—390.)

On a motion for the production of documents, the defendant was permitted to show, by affidavit, that they could not be left in the office without great inconvenience; but as the ground for this indulgence was not stated by the answer, he was ordered to pay the costs.

1842.  
Dec. 15.  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 389 ]

On a former day, a motion having been made by the plaintiff, that the defendant might deposit with the clerk of records and writs the documents admitted by his answer to be in his possession, it was stated, on behalf of the defendant, that most of them were in constant use, and could not be produced without great inconvenience to the defendant. It was therefore asked that



GARDNER  
v.  
DANGER-  
FIELD.

they might be produced at Cheltenham, where the defendant resided.

The ground for this indulgence not having been stated in the defendant's answer, he was allowed to file an affidavit to verify the circumstances, and the case stood over.

The affidavit was now produced and the order made.

[ 390 ]

*Mr. Turner and Mr. Parry, for the defendant.*

*Mr. Pemberton asked for the costs.*

THE MASTER OF THE ROLLS:

The defendant must pay the costs, as he ought to have made this statement in his answer.

1843.  
Jan. 30.

*Rolls Court*  
Lord  
LANGDALE,  
M.R.

[ 392 ]

# BUTCHER v. LEACH (1).

(5 Beav. 392—393; S. C. 7 Jur. 74.)

Bequest of the interest of the residue to the widow for the maintenance of the testator's children; and after her decease, the property "to be shared equally amongst all his children, if they should have attained twenty-one, and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age." A child who died under twenty-one, in the lifetime of the widow, held not to have a vested interest.

[ \*393 ]

THE testator, John Willeter Dearle, by his will dated in 1821, after directing the investment of his residue in Government securities, and making a provision for his widow, ordered and directed his executors to pay to his widow all the interest and proceeds of the monies placed out at interest, as they should become due and payable, half yearly, for the maintenance and education of his children; and he further "declared it to be his will, that after the decease of his wife, all his effects and \*property should be shared equally amongst all his children, if they should have attained the age of twenty-one; and if any had not attained that age, then that his executors should act as trustees until the eldest attained that age, and then pay him his share, and each one as he or she attained that age, unless his executors were not

(1) This case (like *Taylor v. Bacon*, 42 R. R. 120) is scarcely consistent with the general rule that a legacy payable at twenty-one is vested if the

intermediate income is applicable for the benefit of the legatee during minority.—O. A. S.

satisfied with his or her conduct; then and in that case, he ordered and directed his executors to detain the money of such an one until he or she should be twenty-five."

BUTCHER  
v.  
LEACH.

Mary Redford Dearle, one of the children of the testator, died under twenty-one years, in the lifetime of the widow.

The question was, whether Mary Redford Dearle took a vested interest.

*Mr. Winstanley*, for the petitioners, the surviving children, who had all attained twenty-one.

*Mr. Hallett*, *contrà*, cited *Wadley v. North* (1).

#### THE MASTER OF THE ROLLS :

I am of opinion that the child who died under twenty-one, in the lifetime of her mother, had not a vested interest. The petitioners are therefore entitled.

### ALLEN v. ALDRIDGE, IN RE WARD (2).

(5 Beav. 401—406; S. C. 13 L. J. Ch. 155; 8 Jur. 435.)

The fees of the steward of a manor, who is a solicitor but acts in the character of steward only, are not taxable under the 6 & 7 Vict. c. 73.

This statute does not authorise the taxation of every pecuniary demand or bill of a solicitor, for every species of employment in which he may happen to be engaged.

A bill may be taxed though no part of the business was transacted in any court of law or equity, but such business must be connected with the profession of an attorney or solicitor: business in which the attorney or solicitor was employed because he was an attorney or solicitor, or in which he would not have been employed if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer.

1843.  
Dec. 20.  
1844.  
Feb. 19.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 401 ]

THIS case came on upon a petition for the taxation of the bill of fees and charges of Mr. Ward, the steward of the manor of Cookham. Mr. Ward was a solicitor of this Court.

The 6 & 7 Vict. c. 73, s. 37, provides that no solicitor shall commence an action for the recovery of any fees "for any business done" until the expiration of one month after he shall have delivered a bill of such fees; and that upon the application of the party chargeable therewith, the LORD CHANCELLOR or MASTER OF

(1) 4 R. R. 16 (3 Ves. 364).

(2) This and the three following cases were inserted out of their

regular order, for the convenience of the branch of the profession peculiarly interested in them.

ALLEN  
v.  
ALDRIDGE

To send this sort of matters to the taxing Masters will be to refer to them to decide on the custom of all the manors in England, and their decision on the question of *quantum* would be final. The cases cited do not apply, they were cases between the lord and his steward, who as an attorney had obtained possession of his title-deeds. The Court always interfered in such cases.

*Mr. Pemberton Leigh*, in reply :

The object of the Act was to render all the fees and charges of a solicitor taxable, provided they were connected with law business. It is not necessary that the relation of solicitor and client should exist, as parties interested in the fund out of which payment is to be made are entitled to demand a taxation.

The steward has duties to perform towards the tenant as well as the lord, he has the custody of the rolls in which the tenant has a recognised interest, and in the surrenders and searches he is employed on behalf of the tenant as well as the lord.

[ 405 ]

The proper remedy is by an application for taxation; for the steward says, "I will not admit you unless you pay certain fees." The tenant being thus obliged compulsively to pay, has no other remedy. If he brought an action, the answer would be that the payment was voluntary; and if he indicted for extortion, he could not, by such a proceeding, recover back the money.

1844.  
Feb. 19.

THE MASTER OF THE ROLLS :

This petition is presented by the plaintiffs and defendants in the cause. They allege that Mr. Ward, the steward of the manor, is a practising solicitor, and that his charges are excessive, and they therefore pray that his bill of fees may be taxed.

The question is, whether the charges of the steward of a manor who happens to be a solicitor, but was not employed as such, and who acted only as steward of the manor on the occasion in question, are taxable under the statute, and I am of opinion, that they are not.

The statute does not authorise the taxation of every pecuniary demand or bill which may be made or delivered by a person who is a solicitor, for every species of employment in which he may happen to be engaged.

The business contained in a taxable bill may be business of which no part was transacted in any court of law or equity; but I am of opinion that it must be business connected with the profession of an

attorney or solicitor—business in which the attorney or solicitor was employed, because he was an attorney or solicitor, or in which he would not have been employed, if he had not been an attorney or solicitor, or if the relation of attorney or solicitor and client had not subsisted between him and his employer.

ALLEN  
v.  
ALDRIDGE.

It may perhaps, on some occasions, be questionable, whether the business contained in a solicitor's bill be or be not such as to make the bill taxable under the Act; but in the present case I do not see any reason to doubt. The relation of solicitor and client did not subsist between Mr. Ward and the petitioners, or any of them, or between Mr. Ward and any other person in relation to this matter. He was not employed by the petitioners because he was a solicitor, but because he was steward of the manor, and he might have been steward of the manor without being a solicitor. His bill is not as to any part of it a solicitor's bill; it is the bill of charges claimed to be payable to the steward of a manor, and nothing else; and I am of opinion that the statute gives me no jurisdiction over it.

[ 406 ]

*Dismiss the petition with costs.*

### IN RE BECKE AND FLOWER.

(5 Beav. 406—410; S. C. 13 L. J. Ch. 157; 8 Jur. 505.)

After payment of a bill, an order for taxation is not to be obtained as of course, even by a party liable to pay the same.

Under the 6 & 7 Vict. c. 73, any party entitled to the order may obtain it, as of course and without special directions, within one month after delivery, and with such special directions as the Court may order to be imposed, after the expiration of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order made upon special circumstances, to be proved to the satisfaction of the Court, is required.

A mere volunteer, under no previous liability, does not by paying a solicitor's bill acquire a right to tax it.

In January, 1843, Mr. Whately assigned his estate to Messrs. Becke and Flower, who were solicitors, on trust to pay the expenses and divide the residue amongst the scheduled creditors. Messrs. Becke and Flower accepted the trusts and incurred some expenses therein.

In June, 1843, Mr. Whately took the benefit of the Insolvent Debtors Act, and Mr. Hearne was appointed \*his assignee. The solicitor of the assignee applied to Messrs. Becke and Flower for the delivery to him of the deed of assignment and other documents, and the assent of the creditors under the trust deed having been

1843.  
Dec. 22.  
1844.  
Feb. 19.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

[ 406 ]

[ \*407 ]

In re  
BECKE.

obtained, Messrs. Becke and Flower were willing to do so, on payment of the costs incurred in the preparation of the deed and otherwise about the trusts. On the 15th of August, 1843, the particulars of these costs were sent by Messrs. Becke and Flower to the solicitor of Mr. Hearne, the assignee.

On the 10th of November, 1843, Mr. Hearne, the assignee, by his solicitor paid the amount of the charges under protest, at the same time stating that it was his intention to apply for an order for taxation.

On the 16th of November, 1843, Mr. Hearne, as assignee of Mr. Whately, obtained *ex parte* an order for the taxation of the bill of Messrs. Becke and Flower.

A petition was now presented by Messrs. Becke and Flower to discharge the above order for taxation, with costs.

*Mr. Pemberton Leigh* in support of the application :

This order is perfectly irregular as an order of course. First, it was obtained *ex parte* after payment, and under the forty-first section of the 6 & 7 Vict. c. 73, it was necessary that the Court should determine whether, under "the special circumstances of the case," the bill required taxation, and that it should impose "such terms and conditions" as should seem right; secondly, it was obtained after the expiration of a month from the time of the delivery of the bill; and after the expiration of that time, by the thirty-seventh section, a taxation can only be obtained "with such directions \*and subject to such conditions as the Court or Judge making such reference shall think proper."

[ \*408 ]

Lastly, the business was never transacted by Messrs. Becke and Flower as the solicitors of the insolvent or his assignee, neither of them was therefore a "party chargeable by such bill," nor was the respondent "liable to pay" within the thirty-eighth section, and consequently he had no right to get any order for taxation.

*Mr. Craig, contra :*

The right of this party to have the bill taxed arises under the thirty-eighth section. It enacts "That where any person, not the party chargeable with any such bill within the meaning of the provisions thereinbefore contained, shall be liable to pay or shall have paid such bill, either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor,

administrator, or assignee to make such application for a reference for the taxation and settlement of such bill, as the party chargeable therewith might himself make." Here, the right to have a taxation accrued to Mr. Hearne upon payment of the bill, and the provision as to taxation after the expiration of a month from the delivery of the bill contained in the thirty-seventh section, cannot therefore apply.

In re  
BECKE.

The payment was made under protest, and reserving the right to taxation; and if, as is argued on the other side, Mr. Hearne, the assignee, is not "the party chargeable," the bill has not been delivered a month, and the order was properly obtained as of course within a month after the right to taxation accrued.

*Mr. Pemberton Leigh, in reply:*

The thirty-eighth section of the Act places a party not chargeable, but who pays a bill, in the same situation as the party chargeable.

A stranger having no interest in the matter cannot, by paying a solicitor's bill, acquire, under this Act, a right to tax it.

[ 409 ]

#### THE MASTER OF THE ROLLS:

1844.  
Feb. 19.  
—

This petition is presented by solicitors to discharge an order, obtained as of course, to tax their bill, at the instance of a person who had paid the bill without having been liable to do so.

Two objections were made to the order sought to be discharged.

First; it was obtained as of course after payment of the bill, and three months after it was delivered.

Secondly; it was obtained by a mere volunteer, who, being under no liability, spontaneously paid the bill.

I am of opinion that, after payment of a bill, an order for taxation is not to be obtained as of course even by a party liable to pay the same. Under the Act, any party entitled to the order may obtain it as of course, and without special directions, within one month after delivery, and, with such special directions as the Court may order to be imposed, after the expiration of one month from the delivery, but not after verdict, writ of inquiry, or payment. In those cases a special order, made upon special circumstances to be proved to the satisfaction of the Court, is required.

This order must be discharged, with costs, upon the first objection, that it was obtained as of course after payment, and without any special direction after the expiration of a month from the time when the bill was \*delivered. It is therefore unnecessary for me

[ \*410 ]

In re  
BECKE.

to give any opinion upon the second objection; but I may say, that I see no reason to think, that payment by a mere volunteer under no previous liability (which the respondent has admitted to be the case here), can, upon the fair construction of the Act, give any right to obtain an order to tax the bill.

*Order discharged, with costs.*

1844.

Feb. 9, 19.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

On Appeal.

June 1, 3, 5,  
Dec. 4.

Lord  
LYNDHURST,  
L.C.

[ 415 ]

## SAYER v. WAGSTAFF.

(5 Beav. 415—424; S. C. 13 L. J. Ch. 161; affd. 14 L. J. Ch. 116; 8 Jur. 1063.)

A petition being presented for the taxation of a solicitor's bill: Held, that the application was to be considered as made at the latest at the time of answering the petition, and not at the time of service of the petition, or the day appointed for hearing. In cases of accidental delay in the office, the period may be carried further back.

Where a debtor delivers to his creditor his promissory note for the amount of the debt, the debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid; or if, from the conduct of the creditor, or the special circumstances of the case, such an agreement is legally to be implied. But in the absence of any special circumstances, the transaction does not amount to a discharge of the original debt, but a mere extended credit.

A solicitor delivered his bill of costs on the 14th of October, 1842, for which, the client, on the 3rd of November, 1842, gave his promissory note, which was paid on the 17th of November, 1842. On the 15th of November, 1843, the client presented a petition for the taxation of the bill, which was answered on the 16th, and was served on the 21st. The day appointed for hearing was the 24th. Held, first, that the bill must be considered as paid on the 17th of November, 1842; and, secondly, that the application for taxation must be considered as made at the latest on the 16th of November, 1843, and consequently that the application for taxation had been made within twelve months, according to the forty-first section of the 6 & 7 Vict. c. 73.

The continuance of the relation of solicitor and client is not by itself a sufficient reason for taxation of a bill of costs after payment by the client.

THIS was a petition by a client for the taxation of his solicitor's bill.

The facts which were not in dispute, were as follows:

The signed bill, amounting to 135*l.* 2*s.* 8*d.*, was delivered to the petitioner on the 14th of October, 1842, and payment was then requested.

On the 3rd of November, 1842, the petitioner, with a view to discharge the bill, gave to the respondent his promissory note for 135*l.* payable in fourteen days, and on the 17th of the same month of November, the promissory note was duly honoured and paid.

[ 416 ]

On the 15th of November, 1843, the present petition for taxation

was brought to the secretary's office. On the following day the common answer or order, requiring the parties concerned to attend on the then next petition day (the 24th of November) and that notice should be given, was written on the petition, and signed by the secretary in the usual manner. The petition was served on the 21st of November, and might have been heard on the 24th, if the parties had been ready, and the state of business in Court had allowed it.

SAYER  
C.  
WAGSTAFF.

The respondent alleged, that the bill had been paid more than twelve calendar months before any application had been made to tax it, and that, therefore, taxation was precluded by the proviso in the forty-first section of the 6 & 7 Vict. c. 73.

The petitioner, on the other hand, alleged, that the bill in question had been paid less than twelve calendar months at the time he applied for the order to tax it; and that, under the special circumstances, there ought to be a reference for taxation notwithstanding payment.

The questions therefore raised were, first, as to the time when the bill was paid, and secondly, as to the time when the petitioner, according to the terms of the forty-first section, "made the application for such reference" for taxation.

A third question arose, in the event of its being determined that the application was made within twelve months, which was this: whether "the special circumstances of the case," in the opinion of the Court, appeared to require a taxation of the bill. It was, however, arranged between the parties, that the third question \*should not be discussed until the preliminary question had first been disposed of. [ \*417 ]

*Mr. Kindersley* and *Mr. George Turner*, in support of the petition, contended, that the forty-first section did not in all cases preclude taxation, where the application was not made within twelve months after payment; and that if such had been the intention of the Legislature, it would have been distinctly expressed. That before the statute, a solicitor's bill could be taxed after payment, if there were special circumstances, *Horlock v. Smith* (1); and that now the Court under its general jurisdiction over its officers, had still the power, in a proper case and under special circumstances, of sending a bill for taxation, although twelve months had expired.

\* \* \* \* \*



SAYER  
v.  
WAGSTAFF.  
[ \*418 ]

Secondly, they insisted that the application for taxation had been made within twelve calendar months \*after payment. \* \* \*

Next they argued, that the application for taxation must be considered as having been made on the day on which the party had presented his petition. \* \* \*

[ 419 ] *Mr. Cooper and Mr. Moore, contra.* \* \* \*

[ 420 ] The MASTER OF THE ROLLS reserved judgment.

Feb. 19.

THE MASTER OF THE ROLLS :

There can be no doubt that the bill in question was paid on the 17th of November, 1842; but the respondent insists that it ought to be deemed to have been paid on the 3rd day of the same month, when he received from the petitioner the promissory note, which was afterwards duly honoured and paid.

[ \*421 ] Again, the petitioner alleges, that, his application for an order to tax the bill, if not made on the day when \*he left his petition at the secretary's office must, at the latest, be held to have been made on the 16th of November, 1843, when the petition was answered. On the other hand, the respondent insists that service of the petition was necessary to make the application effectual; and that, therefore, the application ought to be deemed to have been made on the 21st of November, 1843, on which day the petition was served.

I shall first consider the time when the application for a reference was made.

Any party desirous to have a matter heard on petition takes his petition to the secretary's office. The secretary makes an entry in his book of the cause or matter in which the petition is presented, and writes upon the petition itself the usual order for the parties to attend on the day appointed for hearing the petition, and for notice to be given. The petition is, from the time when such order is made, a regular proceeding in Court, upon which affidavits may be made; and any party interested to inquire whether a petition in his matter has been presented or not, may ascertain the fact on application to the secretary. Previously to the time appointed for hearing, and before the petition can be set down to be heard, a copy of it is to be left for the perusal of the Judge who is to hear it, and the petition itself is to be filed before any order upon it is passed.

And such being the course of proceeding, I am of opinion, that

an application for the purpose stated and prayed by the petition must be considered as made, at the latest, at the time when the order appointing the \*time for hearing the petition, is signed either by the Judge to whom the petition is addressed, or by his officer acting under his directions. If it should happen that a petition was duly brought to the office, and without any default of the petitioner, but by some accident or neglect in the office, the answer or order was not made at the time when it ought to have been, the application might be considered as made even before the answer or order for attendance was signed ; but no such question arises here. The petition was answered ; and I must consider that the application for a reference to tax the bill in question was made on the 16th of November, 1843.

SAYER  
v.  
WAGSTAFF.  
[ \*422 ]

Now the proviso in the forty-first section of the statute is, “that the application for such reference be made within twelve calendar months after payment.” It is the application, not the service of a petition or the time appointed for hearing a petition, but the application alone which is to take place, or be made within twelve calendar months after payment ; and I have now to inquire whether the 16th of November, 1843, the time of the application in this case, was within twelve calendar months after payment of the respondent’s bill.

If the bill was paid on the 3rd of November, 1842, as the respondent alleges, more than twelve months had elapsed between the payment and the application for the reference ; but if the payment was not made till the 17th of November, as the petitioner alleges, then, at the time of the application for the reference, twelve months had not elapsed from the time when the bill was paid.

The substantial question is, whether a debt is to be considered as paid, at the time of the delivery to the creditor of a promissory note for the amount payable on a future day, on which, or in due time after which, the note is afterwards duly honoured and paid.

[ 423 ]

The debt may be considered as actually paid, if the creditor, at the time of receiving the note, has agreed to take it in payment of the debt, and to take upon himself the risk of the note being paid, or if, from the conduct of the creditor or the special circumstances of the case, such an agreement is legally to be implied.

But in the absence of any special circumstances throwing the risk of the note upon the creditor, his receiving the note in lieu of present payment of the debt, is no more than giving extended

SAYER  
v.  
WAGSTAFF.

credit, postponing the demand for immediate payment, or giving time for payment on a future day, in consideration of receiving this species of security. Whilst the time runs, payment cannot legally be enforced, but the debt continues till payment is actually made; and if payment be not made when the time has run out, payment of the debt may be enforced as if the note had not been given. If payment be made at or before the expiration of the extended time allowed, it is then, for the first time, that the debt is paid.

[ \*424 ]

There may, as I have said, be special circumstances, from which it may be concluded that a note or bill of exchange was taken as payment of the debt for which it was given; and it is said that, in a case before Mr. \*Justice Coltman at Chambers, he held that payment was to be considered to have been made at the time when a bill and note were given as securities for payment. There may be circumstances leading to that conclusion in the case referred to; there are, I think, no such circumstances in the case now before me. I have thought it right to read the affidavits, for the purpose of ascertaining whether there was any evidence that Mr. Sanders took this note in lieu and full satisfaction of the debt due to him upon his bill of costs, and I find no such evidence. Mr. Sanders did not take upon himself the whole risk of the note: the petitioner was not released from the debt. If the note had not been duly paid, Mr. Sanders would have been entitled to enforce payment of the amount due to him upon his bill, and might have brought an action against the petitioner to recover it.

I am, therefore, of opinion that the bill was not paid till the 17th of November, 1842, and that the application for the reference to tax the bill was made on the 16th of November, 1843, being one day less than twelve calendar months after the payment. The bill may be taxed, if there are such special circumstances as to make taxation proper, and the petition must be further heard as to that point.

1844.  
June 1, 3, 5.  
[ 14 L. J. Ch.  
117 ]

The solicitor appealed from that decision, [as reported in 14 L. J. Ch.; see p. 116].

*Mr. Wakefield, Mr. Cooper, and Mr. Moore* appeared for the appellant; and

*Mr. James Russell and Mr. Stinton, contra.*

THE LORD CHANCELLOR [after affirming the decision of the MASTER OF THE ROLLS on the points already reported, dealt with the question of special circumstances, and after referring to the cases of *Horlock v. Smith* (1) and *Waters v. Taylor* (2), and the cases there cited, and in particular to the observations of the learned Judge in *Waters v. Taylor* (3), he said]:

SAYER  
v.  
WAGSTAFF.  
1844.  
Dec. 4.

These observations show distinctly that the learned Judge did not think that the continuance of the relation of solicitor and client was alone sufficient to justify the Court in ordering taxation of paid bills. I concur in that opinion. I am not sure, referring to the Act 6 & 7 Vict. c. 73, that it was not intended to alter the law, in some respects, by that Act. But I am of opinion that the subsisting relation of solicitor and client between the parties at the time of payment of the bill, is not sufficient to justify a reference of the bill for taxation after payment.

[ 119 ]

### IN RE DOWNES (4).

(5 Beav. 425—430; S. C. 13 L. J. Ch. 159.)

1844.  
Feb. 10, 19.

Rolls Court.  
Lord  
LANGDALE,  
M.R.

[ 5 Beav.  
425 ]

Application by cestui que trust for the taxation of a bill of costs paid by his trustees more than twelve calendar months, refused.

Where a cestui que trust applies for taxation, then if there has been no payment, the rules under which taxation is to be directed are such as are pointed out by the thirty-seventh section of the 6 & 7 Vict. c. 73, and if there has been payment, by the forty-first section.

Whenever the 6 & 7 Vict. c. 73, applies, the Court cannot in any case whatever send a bill for taxation as against the solicitor, if it has been paid more than twelve months, but the Court may, after that period, direct a taxation as between a trustee and his cestui que trust, to justify the payments of the former.

The words "any such bill," in the forty-first section, do not mean the bill mentioned in the section immediately preceding, viz. any bill "previously taxed and settled;" nor are they limited to such bills as under the provisions of the Act are sought to be taxed by a party directly chargeable.

Where a solicitor's bill has been paid by a trustee, the cestui que trust cannot after the expiration of twelve months from payment, obtain a taxation, as against the solicitor, although he had no notice of the payment until after the twelve months had expired.

THIS petition was presented by persons interested in the estate of John Bullock, deceased, praying that several bills of costs paid by the trustees of John Bullock's will might be taxed.

(1) 45 R. R. 125 (2 My. & Cr. 495).

(2) 45 R. R. 129 (2 My. & Cr. 526).

(3) 45 R. R. at pp. 133, 134 (2 My. & Cr. at p. 556).

(4) Followed by the Court of

Appeal; *In re Wellborne* [1901] 1 Ch.

312; 70 L. J. Ch. 172, 83 L. T. 611.

In re  
DOWNES.

On the first hearing of the petition, the Court expressed an opinion that the only bill upon which any question arose was to be considered as paid on the 2nd day of May, 1842, and the application for a reference to tax the bill having been made more than twelve calendar months after payment, the question was, whether the bill was now taxable under the Act.

*Mr. Turner*, in support of the petition :

As the petitioners are interested in the property out of which the trustees have paid the bill in question, the Court is, by the thirty-ninth section of the 6 & 7 Vict. c. 79, authorised to refer the bill for taxation. That clause directs, "that in any case" in which a trustee has become chargeable with such bill, the Court, on the application of a party interested in the property out of which the trustees may have paid the bill, may refer the same for taxation.

[ 426 ] The fact of payment for more than twelve months does not, under the forty-first section, preclude the taxation.

The forty-first section must be limited to some particular bills, and cannot be held to extend to all paid bills ; for the thirty-seventh section, which extends to all bills paid or unpaid, authorises a taxation after twelve months "under special circumstances to be proved to the Court." Now, by the forty-first section, "the payment of any such bill as aforesaid," is in no case to preclude taxation, provided the application for the reference be made within twelve calendar months after payment. The words "any such bills as aforesaid" have reference to the bills mentioned in the section immediately preceding the fortieth, which are bills "previously taxed and settled ;" therefore, to bring the case within the forty-first section, the bill must have been previously taxed as well as settled.

Lastly, the words "any such bill as aforesaid," contained in the forty-first section, apply only to bills sought to be taxed by parties directly chargeable, and not to those sought to be taxed at the instance of parties out of whose property the bills are payable as in the present case, who may have no notice of the payment until long after twelve months have expired.

*Mr. Kindersley*, *contrà* :

The proviso in the forty-first section, "that the application for the reference be made within twelve calendar months after payment," precludes any taxation after that period.

The forty-first section is the first which relates to bills which have been paid. The thirty-seventh relates to unpaid bills alone, which may be taxed as of course \*within a month after delivery of the bill, or with special directions and conditions after that period until the expiration of twelve months; but no reference is to be made after verdict &c., or after twelve months, "except under special circumstances, to be proved to the satisfaction of the Court." The thirty-eighth and thirty-ninth sections relate to taxation at the instance of third parties; but these only give to such persons similar rights to those to which the parties chargeable are entitled.

The forty-first section applies to all cases in which payment has been made.

*Mr. Headlam*, for the trustees.

*Mr. Turner*, in reply.

#### THE MASTER OF THE ROLLS :

This petition is presented by persons interested in the estate of John Bullock, deceased, praying that certain bills of costs, paid by the trustees of John Bullock's will, may be taxed.

On the hearing of the petition, I expressed my opinion that the only bill upon which any question arises was to be considered as paid on the 2nd day of May, 1842; and the application for a reference to tax the bill having been made more than twelve calendar months after payment, the question is, whether the bill is now taxable under the Act.

The Act provides, that where a trustee has become chargeable with a bill of costs, the Court, upon the application \*of a party interested in the property out of which the trustee may have paid, or be entitled to pay, the bill, may refer the same to be taxed, with such directions as may be thought proper; and I think that, save as to such special directions as may be thought proper in the peculiar case, the rules under which the taxation is to be directed are such as are pointed out in the thirty-seventh section, if there has been no payment, and by the forty-first section if there has been payment.

By the thirty-seventh section, the case of the bill having been paid is not at all contemplated. It relates to unpaid bills only, and provides that, within one month after delivery, taxation may be ordered without special direction; that, after the expiration of

In re  
DOWNES.

[ \*427 ]

*Feb.* 19.

[ \*428 ]

In re  
DOWNES.

one month from the time of the bill being delivered, taxation may be ordered with such directions as the Court may think proper, and that after verdict or writ of inquiry, taxation is only to be ordered on special circumstances, to be proved to the satisfaction of the Court.

The forty-first section contemplates the case of payment before any application to tax the bill is made; and it provides that payment shall not preclude taxation, if the special circumstances of the case shall, in the opinion of the Court, appear to require the same, upon such terms and conditions, and subject to such directions as to the Court shall seem right, "provided the application for such reference be made within twelve calendar months after payment."

[ \*429 ]

It was argued that the forty-first section, if construed to extend to all paid bills, would be inconsistent with the thirty-seventh section, which extends to all bills; secondly, that, upon the true construction of the Act, the words, "any such bill as aforesaid," contained in the forty-first section, mean only any such bill as is \*mentioned in the section immediately preceding to have been "taxed and settled;" and, thirdly, that, at all events, the words "any such bill as aforesaid" contained in the forty-first section cannot be construed to mean any bill which is sought to be taxed by parties other than those directly chargeable therewith.

I cannot concur in any of these arguments. The thirty-seventh section relates exclusively to unpaid bills; and, if it were not for the forty-first section, paid bills would not be taxable at all under this Act. But the forty-first section enacts, that payment shall not preclude taxation, if the circumstances be such as to make taxation proper, and if the application be made within twelve calendar months after payment. Mr. Justice PATTERSON, in the case of *Binns v. Hey* (1), stated that, he considered the true construction of the clause to be, that wherever the Act applies, the Court cannot send a bill for taxation if it has been paid more than twelve months in any case whatever. I entirely concur in that opinion, as affording the general rule, subject, however, to a qualification in this Court. I think that in this Court the bill cannot be ordered to be taxed as against the solicitor himself, if twelve calendar months have elapsed after the payment. But if a trustee or executor has paid a solicitor's bill improperly, and has neglected to procure the bill to be taxed in due time, there appears

(1) 1 D. & L. 661, 13 L. J. Q. B. 28.

to be nothing in this Act to prevent this Court (when called upon to disallow the whole or part of a payment alleged to have been made by a trustee or executor) from ascertaining, by taxation, if necessary, what is a proper sum to be allowed to the trustee or executor for his payment.

In re  
DOWNES.

I cannot so construe the Act as to make the words “any such bill as aforesaid” in the forty-first section to mean only “any such bill as is hereinbefore mentioned to have been taxed and settled,” or “any such bill as under the provisions of this Act is sought to be taxed by a party directly chargeable with such bill.” The words themselves import no such restriction, and I can find nothing to warrant the proposed construction.

[ 430 ]

It is supposed that there may be some hardship on third parties who are enabled to tax the bills within a limited time only, and may have had no notice of the payment till too late. Such cases may arise, and in them the statute does not give so much benefit as might perhaps be desired ; but the case stands thus : Before the Act came into operation, the cestui que trust, out of whose estate a solicitor’s bill was to be paid, could not procure the bill to be taxed as against the solicitor directly, but he might impeach any improper or extravagant payment made by his trustee in discharge of the solicitor’s bill, and might, as against the trustee, cause the solicitor’s bill to be taxed. Under the Act, every remedy which the cestui que trust had against the trustee remains to him, and, besides that, he is entitled to ask for taxation against the solicitor directly, at any time before payment of the bill, or within twelve calendar months after payment.

I am of opinion that there ought to be no taxation of the bill which was paid on the 2nd of May, 1842.

### HINDE v. BLAKE.

(5 Beav. 431 ; S. C. 12 L. J. Ch. 56.)

Attachment discharged, with costs, on the ground of the order upon which it was founded having inaccurately stated the consequences of a non-performance.

1842.  
Nov. 25.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

AN order had been made on the 7th of May, 1842, upon the defendant for the transfer into Court of the sum of 11,000*l.* Consols.

[ 431 ]

The order was served on the defendant ; but at this time the 11th



HINDE  
v.  
BLAKE.

and 12th General Orders of the 26th of August, 1841 (1) had been amended by the 6th Order of the 11th of April, 1842 (2).

The order, instead of stating that if the defendant neglected to obey it, "he would be liable to be arrested under a writ of attachment," as it ought to have done according to the amended orders, stated, in the old form, "that he would be liable to be arrested by the Serjeant-at-Arms," &c.

The defendant neglected to make the transfer, and an attachment issued.

*Mr. Lovat* now moved to discharge it for irregularity, on the ground that the copy of the order served, incorrectly stated the consequences of a default in obeying it.

The MASTER OF THE ROLLS discharged it with costs.

1842.  
June 10.  
July 22.  
  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 433 ]

### MARCH v. THE ATTORNEY-GENERAL (3).

(5 Beav. 433—442; S. C. 12 L. J. Ch. 31; 6 Jur. 829.)

Policies of assurance by which the directors of the Companies issuing the policies engage "to pay out of the funds," or "that the funds shall be liable," or "that a share of the funds shall be paid," are not so connected with land, as, under the Mortmain Act, to render invalid a gift of them to charity, although the assets of the assurance Companies consist partly of real estate.

The rule is the same, although, by the policy sealed with the corporate seal of the Company, the assured becomes a member.

THE testatrix, Mary Barfield, bequeathed the residue of her monies, securities for money, and her other personal estate to certain charities; and it being alleged that part of such personal estate was so connected with land as to render the gift to charity invalid, under the Statute of Mortmain (4), this suit was instituted, for the purpose of having the rights of the next of kin and of the charity ascertained.

[ \*434 ] A decree was made in the cause dated the 24th of July, 1838, which, after directing the usual accounts to \*be taken of the personal estate of Mary Barfield, ordered the Master to ascertain and state the clear residue of such personal estate, and of what the same consisted, and the nature and particulars thereof, and how

(1) Ord. Can. 166. *n. (a)*, and 167, Charitable Uses Act, 1891 (54 & 55 *n. (a)*). Vict. c. 73).

(2) Ord. Can. 166, 167, and 198.

(4) 9 Geo. II. c. 36 [rep. except s. 5,

(3) See now the Mortmain and 51 & 52 Vict. c. 42, s. 13].

MARCH  
v.  
A.-G.

much consisted of pure personalty, and how much of personalty connected with land.

The Master, by his report dated the 20th of December, 1841, certified that the residuary personal estate of the testatrix, at the time of her death, consisted, in part, of the following particulars :

1st. A sum of 2,000*l.* due from John Wall, with an arrear of interest from the 6th of August, 1838, and which was secured by mortgage of a policy of insurance from the Society of Equitable Assurances.

2ndly. A sum of 210*l.* received from the Economic Life Assurance Society upon a policy of insurance on the life of Margaret Maria Adam.

3rdly. A sum of 150*l.* assured on the life of Joseph Hudson (who was still living) in the Law Life Assurance Office.

And, 4thly. A sum of 1,200*l.*, which was received on a policy of insurance effected by the testatrix on the life of George Hornsby in the Amicable Assurance Society.

The Master stated his opinion, that the same several sums of 2,000*l.*, 210*l.*, 150*l.*, and 1,200*l.* received upon or secured by such policies of insurance were personal estate connected with land, according to and in the proportion, which the funds properly subject to the payment thereof, which consisted of estates or securities on real estates, bear to the funds and property subject to the payment thereof, which consisted of pure personal estate.

To this finding three sets of exceptions were taken ; and the exceptants alleged, that the Master ought to have found all the several sums of 2,000*l.*, 210*l.*, 150*l.*, and 1,200*l.* to be pure personal estate.

[ 435 ]

It appeared that all of the several insurance Companies by whose policies these several sums were secured, and upon which policies all the sums, except the 150*l.*, had been received, were entitled to some real estate, or chattels real, or some funds which were secured on mortgages of real estate or chattels real ; and that such being the stocks or funds of the several insurance Companies, they adopted several distinct modes of providing for the payment of the sums payable on the policies they granted.

The policies granted by the Equitable Assurance Society consisted of covenants by two trustees, that they, upon the payments becoming due, would pay or cause to be paid, out of the stock or fund of the society, unto the executors of the assured the full sum assured.

The policies of the Economic Life Assurance Society were instru-

MARCH  
r.  
A.-G.

ments signed by three directors, providing, that if the premiums were duly paid, the funds and property of the society, according to the articles of settlement, after payment of all prior charges, should be liable to pay the sums assured; and it was declared, that the funds or property of the society, after payment of prior charges, should alone be answerable for the payment of the sums assured.

[ \*436 ]

The policies of the Law Life Assurance Society were signed by three directors, and provided, that if the premiums were duly paid, the stocks, funds, securities, and property of the society should be liable, according \*to the provisions of the deed of settlement, to pay the sum assured; and that the subscribed capital and other stocks, funds, and securities and property of the society should alone be liable to answer the claims on the society.

The policies of the Amicable Society were sealed with the common seal of the society, and thereby the assured were admitted members of the society, and the society obliged themselves to pay to the person effecting the policy, such a proportion or share of the joint stock and fund of the society, as would become due on the death of the assured according to the charter or bye-laws of the society.

The exceptions now came on for argument.

*Mr. Pemberton, and Mr. Metcalfe, and Mr. Teed, and Mr. Rolt,* in support of the charitable gifts, [cited *Bligh v. Brent* (1) and other cases].

*Mr. Tinney* for the executors.

[ 438 ]

*Mr. Wray* for the Attorney-General.

*Mr. George Turner and Mr. Stinton, contra*, for the next of kin, [cited *Negus v. Coulter* (2); *Knapp v. Williams* (3); *House v. Chapman* (4); *Finch v. Squire* (5); *Harrison v. Harrison* (6); and other cases].

[ 440 ]

*Mr. Teed*, in reply.

July 22.

THE MASTER OF THE ROLLS:

In the various forms stated, the mixed funds or stock of the societies or Companies are referred to as the funds out of which

(1) 47 R. R. 420 (2 Y. & C. Ex. Eq.  
268).

(2) Amb. 367.

(3) 4 R. R. 252 (4 Ves. 430, n.).

(4) 4 R. R. 292 (4 Ves. 542).

(5) 7 R. R. 337 (10 Ves. 41).

(6) 32 R. R. 145 (1 Russ. & My. 71).

the grantors of the policies are to make the payments. "The grantors will pay out of the funds," \* "the funds shall be liable," or "a share of the funds shall be paid," are the different forms of expression used; the seeming intent being, to relieve, if practicable, those who execute the policies from personal liabilities, and to hold out to the grantees the notion of security for the payment of the sums of money payable on the policies. The question is, whether, under such circumstances, the sums secured are pure personal estate or personal estate connected with land.

MARCH  
v.  
A.-G.  
[ \*441 ]

The grantees of the policies contract for a sum of money to be paid on a future event. Whatever may be the property possessed by the grantors, the grantees have not, by their contract, any immediate control over it or lien upon it. The grantors or their trustees continue to have the entire control or management over the whole fund; the real estate or chattels real may be sold and converted into pure personalty, and the pure personalty may be converted into chattels real. This state of things may continue, not only during the contingency upon which payment depends, but after the contingency has determined; for the grantee acquires no specific lien after the payment has become due. Even in default of payment when due, the grantee cannot, by reason of such default only, resort immediately and at once to land or chattels real, but must resort to legal process which will not affect the land possessed by the office at the time of the contract, although it may, in its final result, affect such land as the office may have at the time when the process is executed. Ordinarily, the grantee has nothing but a right of action from the date of the contract until actual payment; and although I conceive it to be possible for circumstances to arise, in which, from the state of the funds, the claims upon it, and the misconduct of trustees and directors, the Court would take possession of the property, and apply it for \*the benefit of all persons having claims upon it, yet I conceive that the bare possibility of such interference, within the meaning of the Mortmain Act, does not connect a sum of money payable on a policy of insurance with the quality of the property which may be held by the grantors.

[ \*442 ]

The cases which have been decided, have gone a great length in bringing money held on securities which affect real estate within the meaning of the Mortmain Act; but none of them go so far as is attempted in this case. Where there is a right to have turnpike tolls, or poor rates, or county rates specifically applied in payment

MARCH  
 v.  
 A.-G.

of a mortgage, the money so secured has been held within the Mortmain Act. There are other cases which have scarcely met with approbation; but this case does not appear to come within the Act, or within any of the decided authorities; and it seems, that if the money secured by a policy of assurance is to be deemed to be connected with land so as to be brought within the Statute of Mortmain, there would be no reason why the same consequence should not attach upon any debt, owing by any person who has real estate or chattels real; for though the right of action imports only pure personalty, yet the result of an action may be to obtain payment out of the land or chattels real.

On the whole I am of opinion that the sums secured by the policies are not within the Act, and that the exceptions must be allowed.

1842.  
 Nov. 5, 8, 9.  
 Dec. 17.

*Rolls Court.*  
 Lord  
 LANGDALE,  
 M.R.  
 [ 448 ]

## NOKES v. WARTON (1).

(5 Beav. 448—462.)

Taxation ordered after settlement and payment of a solicitor's bill containing items not sufficiently explained, although a large proportion of the bill had been abated by the settlement, the client not being in a position in which he could properly protect himself at the time of the settlement, as his pecuniary transactions had placed him completely under the power of the solicitor (2).

THIS was a petition presented by the plaintiff, James Wright Nokes, for the taxation of his late solicitors' bill of costs. The application was resisted on the ground that it had after investigation, been settled and paid.

The circumstances are fully stated in the judgment of the Court.

*Mr. Pemberton and Mr. Teed* in support of the petition.

*Mr. G. Turner and Mr. Jenkins*, *contra*.

[ 449 ]

*Mr. Pemberton*, in reply.

\* \* \* \* \*

The MASTER OF THE ROLLS reserved his judgment.

Dec. 17.

THE MASTER OF THE ROLLS :

The petitioner in this case, having for some time employed the respondents as his solicitors and agents, by his petition prays, that

(1) *Watson v. Rodwell* (1878) 11 Ch. D. 150, 48 L. J. Ch. 209, 39 L. T. 614.

(2) It may be observed that this case was decided before the law as to

taxation after payment was altered by 67 Vict. c. 73; and see the case under that Act reported *ante*, p. 345.—O. A. S.

it may be referred to the Master to tax their bills of costs in all the matters in which they have been employed, and to take an account of all monies received by them on account of the petitioner, and of the application thereof, the petitioner offering to pay what, if anything, shall appear to be due on the taxation and account. The respondents allege, that their bills of costs have, with a very trifling exception, been settled and paid, and they insist that the petitioner is not now entitled to have them taxed.

NOKES  
v.  
WATSON.

The petitioner appears to have been a person engaged in the purchase and sale of land on speculation, borrowing money to complete his purchases, and expecting by re-sales to repay the sums borrowed, and realize a profit for himself. In the year 1838 he had agreed to buy the White Knight's estate, and wanting money to enable him to complete his purchase, he became acquainted with the respondents, the solicitors of Mr. Beardmore, who agreed to advance the money, and on the decease of Mr. Raphael, the former solicitor of \*the petitioner, the respondents became and acted as his solicitors.

[ \*450 ]

In the year 1839, the petitioner contracted to buy Pope's Villa at Twickenham, and the respondents were, as his solicitors in that matter, employed to do what was required in completing the purchase, and employed to borrow money for that purpose, and to prepare for the re-sales which were intended. In various other matters, the respondents appear to have been employed by the petitioner as his solicitors and agents, and to have received and paid several sums of money on his account, till early in the year 1842, when they ceased to act for him.

During the whole time of the employment of the respondents, the petitioner appears to have been in great want of money for his speculations, and to have been thereby reduced to very considerable difficulty. The respondents not only induced their client, Mr. Beardmore, to advance the petitioner 21,000*l.* in December, 1838, but also a further sum of 2,000*l.* in May, 1839, and a further sum of 3,140*l.* to pay off Mr. Cholmeley, who had threatened execution on a judgment which he held for that sum. These several sums were charged on the White Knight's estate, and amounted to the whole purchase-money which the petitioner had agreed to pay for it; the petitioner was not only without means of raising the money which was required for the purpose of completing the purchase of that estate, but was involved in considerable difficulty in the other speculation as to Pope's Villa, and in other matters; and in the

NOKES  
C.  
WARTON.

[ \*451 ]

course of the transactions, considerable sums of money became due from the petitioner to the respondents personally, for business done and for monies advanced. On the 9th of April, 1840, the respondents, as the solicitors \*of Mr. Beardmore, gave notice to the petitioner, that Mr. Beardmore required the petitioner to pay off the sum of 26,140*l.*, then due to him on mortgage of the White Knight's estate, on or before the 13th of July then next.

Under these circumstances, Mr. Beardmore must have been anxious about his money, and the adoption of any lawful means in his power to obtain payment was reasonably to be expected; but, having regard to the facts stated in the affidavits filed on behalf of the respondents, I think that they must have known that the petitioner could not comply with the notice which they sent to him. The notice appears to me to have been well calculated to suggest to the petitioner (if any suggestion was necessary) that he was dependent upon and in the power of Mr. Beardmore and the respondents as his solicitors, and that he must be indebted for any remaining hope of making a profit by his White Knight's speculation to their favour or forbearance. It does not clearly appear from the affidavits, at whose instance or on what particular day, the respondents sent their account current and bills of costs to the petitioner. They appear to have been delivered about July, 1840. During some part of the transactions to which the bills relate, the petitioner's father had acted in the name and on the behalf of the petitioner as his agent, in a manner of which the respondents might have just reason to complain, if they had not continued to act for the petitioner after the facts were known. But the petitioner's father, being his agent and so identified with him, that for a time he seems to have personated him with his authority, was, when the bills and account were delivered, a prisoner in the Fleet Prison, the place where the discussions leading to the settlement in question took place.

[ 452 ]

The petitioner was not induced to acquiesce in the account and bills by any confidence which he placed in the respondents. He might be under the influence of some fear, but confidence in the statements of the respondents he had not, and instead of acquiescing in the account and bills, he appears to have examined them with all the attention in his power. He had an interleaved copy made and placed in the hands of Mr. Pirie and Mr. Browning. Mr. Pirie is described as having been a solicitor, and afterwards a barrister, who had not practised for a considerable time. Mr. Browning, who says that he was brought up to the law, was a

prisoner in the Fleet with the petitioner's father, and these persons appear to have made many observations on the bills of costs, and the several items therein, and to have represented to the petitioner that the bills contained many gross overcharges. Mr. Browning represented the bills of costs to be founded in fraud.

The petitioner was therefore put upon his guard; and this circumstance must be taken into consideration, in connection with the other circumstances, tending to show the power which the respondents might have exercised over him. The petitioner says, that being surprised at the amount of the charges, he expressed his desire to refer them to some solicitor or other person capable of advising him as to the propriety thereof, who should meet and confer with the respondents, relative thereto, but that the respondents absolutely declined and refused to meet any such person at the settlement of the accounts. This allegation is not met in the way that might have been expected, if the respondents had really been willing to submit to the exercise of the petitioner's right to have their bills and accounts fully examined by a competent person. Pirie and Browning \*are referred to as having advised the petitioner, and the refusal to meet a solicitor is not noticed.

The meetings respecting the accounts and bills were held in the Fleet Prison, in the room of Mr. William Nokes. On the 4th of August, the items of the account current, with the exception of those which consisted of the amounts of bills of costs, appear to have been carefully considered and compared with the vouchers then produced, and the bills of costs underwent some discussion in the presence of Pirie. An adjourned meeting was appointed for the 10th of August; on that day no discussion appears to have taken place, but soon afterwards, the petitioner gave to one of the respondents his interleaved copy of the bills of costs, with the objections and observations, and the 25th of August was appointed for another meeting. A meeting was accordingly held in the Fleet Prison on that 25th of August. It is admitted that the petitioner and his father were present on the one side, and the respondents and Mr. Stevenson their clerk on the other side; but it is disputed whether Pirie was present. The respondents and Mr. Stevenson say that he was, whilst Pirie swears that he wished to be present, and was excluded; and Browning says that Pirie was in his room whilst the bills were under examination in the room of William Nokes, and, consequently, could not be present at the time alleged. The respondents and Stevenson admit, that on one occasion when

NOKES  
v.  
WARTON.

[ \*453 ]



NOKES  
 v.  
 WARTON.

the accounts were under discussion, Pirie had been excluded from the room, but state, that the occasion occurred before the 25th of August, and that on such previous occasion Pirie was put out. in consequence of his intemperance. This circumstance tends to show that Pirie, even if he had been present, could not have been an effectual protection to the petitioner; and whether he was in fact present on the \*25th of August, does not appear to me to be of so much importance as at first sight it might appear to be. No great assistance could be derived from a person who came to a meeting for business in a state of intoxication, or who being at such a meeting for the purpose of assisting one party, could be turned out of the room at the will of the other party. At the meeting on the occasion of which Pirie was turned out, the bills, if at all discussed, were discussed in the absence of the only person whose assistance the petitioner could at that time have.

[ \*454 ]

The petitioner, with the assistance of such observations as had previously been made by Pirie and Browning, desired that deductions should be made from the amount of the respondents' charges.

Taking the charges as they were, and as they were brought into the account current, they left a balance of 631*l.* 15*s.* 1*d.* due to the respondents; and the respondents, who had had an opportunity of reading and examining the objections, and who now admit that there were several objectionable items in the bills, say, that after some discussion, and a private consultation with Mr. Stevenson their clerk, the respondent Mr. G. K. P. offered to take 300*l.* in money for the balance. The petitioner contended for a further reduction, and finally, as Mr. Stevenson says, the respondents agreed to accept 250*l.* in full discharge of the balance, thereby making a deduction of 381*l.* 15*s.* 1*d.*; and this agreement being made, the two memoranda which are set forth in the petition were drawn up by Stevenson, and were signed by the petitioner. By one memorandum, it was acknowledged that the accounts and bills were settled, that the balance was 250*l.*, and that certain vouchers were delivered up; and by the other memorandum, the petitioner acknowledged that he was indebted to the respondents in 250*l.*, and agreed \*to charge the same on the White Knight's estate. Certain vouchers were delivered up, and the respondent Mr. G. K. P. thereupon destroyed the interleaved copy of the bills of costs, upon which the observations on and objections to the bills had been stated.

[ \*455 ]

During the preparation for the settlement, at the time of the

NOKES  
r.  
WATSON.

settlement, and afterwards, the relation of solicitor and client continued to subsist between the petitioner and the respondents. Soon after the settlement, attempts were made to sell the White Knight's estate for the purpose of raising money to pay Mr. Beardmore, and those attempts failing, the petitioner released his equity of redemption to Mr. Beardmore for 250*l.*, the amount of the balance, which, on the accounts, was admitted to be due to the respondents, and which was actually applied in satisfying that balance.

It is alleged on this petition, that accounts and bills settled as these were, ought not to stand or to be held to be in any way binding on the petitioner; and further, that even if the accounts should be considered as *prima facie* binding, they ought to be opened, in consequence of the many and important errors which they contained. It is admitted that there are several errors; but it is at the same time alleged (I think in respect of every error admitted), that they were all considered on the settlement, and allowed for in the 38*l.* 15*s.* 1*d.* deducted from the balance. Whether this was so, in fact, cannot now be ascertained, in consequence of the respondent Mr. G. K. P. having destroyed the written objections and observations which were made.

In this case, therefore, we have the account and bills delivered a sufficient time before the settlement to allow the client to examine them and to obtain advice and \*assistance respecting them. The opportunity was taken advantage of, and the bills being examined, many objections were taken, and upon the discussion of those objections, the client obtained an allowance of no less than 38*l.* 15*s.* 1*d.*, in respect of the objections taken. A memorandum of settlement was signed, and also another memorandum admitting the balance to be due, and agreeing to charge it on the White Knight's estate, and some months afterwards, on releasing the equity of redemption on that estate, the petitioner directed the consideration money to be applied in satisfaction of the balance.

These circumstances, taken of themselves, constitute a strong argument for the respondents. In the absence of other circumstances, they would be conclusive, as in other cases circumstances of the like kind, and even less cogent, have often been considered to be; but they are not conclusive, if attended by other circumstances which show that a fair consideration of the accounts was not, and could not be, had. If the client be in the power or at the mercy of the solicitor, if the bills delivered be not sufficiently explanatory, if the client, though having time to examine the bills,

[ \*456 ]

NOKES  
v.  
WARTON.

has not been able to obtain, or has not been allowed to employ, the most effective means of examination, if it appears that the solicitor, in whose power he is, is driving a bargain with him on unequal terms, and that the relation of solicitor and client, and the power of the solicitor, continues, then all the circumstances to which I have referred, as tending to establish the settlement, may be unavailing.

[ \*457 ]

In this case, I think that the petitioner was in the power of the respondents to a great and even an alarming extent. They themselves personally claimed to be creditors of the petitioner to a considerable amount, and \*held acceptances for the sum of 1,200*l.*, which the petitioner was liable to pay. They were the solicitors of Mr. Beardmore, a creditor for not less than 26,140*l.*, the whole amount of the purchase-money for White Knight's. Mr. Beardmore held a judgment for 8,140*l.*, part of the 26,140*l.* Upon that judgment he might have issued an execution, and he had a power of sale, the exercise of which might effectually disappoint the petitioner's hope of profit from that transaction; and the petitioner, having repeatedly failed in the payment of interest, and in his endeavours to obtain money, by means of which he might at the same time improve the security of Mr. Beardmore, and obtain profit for himself, had received from Mr. Beardmore, through the hands of the respondents, a formal notice that payment of the whole debt was required. The petitioner was besides engaged in other transactions of a complicated nature, in which the respondents were his solicitors and agents, whose active and skilful assistance was the only foundation on which he could rest a hope for extrication; and when we attend to these circumstances, the fact which appears on the accounts, that the petitioner was, from time to time, receiving small advances of money from the respondents, I think that the extent to which he was in their power must be sufficiently apparent.

[ \*458 ]

Observations were made upon the conduct of the petitioner in engaging in such transactions without capital; and I do not dissent from them. A man who without capital engages in transactions, and enters into contracts, the conduct and performance of which requires a large capital, pursues a course which is always imprudent and hazardous, and generally dishonest, because generally accompanied by misrepresentation, express or implied, to those with whom he is dealing, and \*by consequent fraud upon them. Such conduct is not to be justified or excused; but the last persons who

have a right to complain of it are those, who knowing the facts, consent, for their own profit, to be the solicitors and agents of the party engaged in such business ; and it cannot fail to be observed, that the very nature of the transactions, the shifts and devices which must be resorted to, and the equivocal position of the principal, must place him, more than ordinary clients, in the power of the solicitors and agents ; nor can I think it improbable, that solicitors in such a situation may be under some temptations to obtain more than usual compensations in money, for the very troublesome and disagreeable business in which they are employed ; but on this head I confine myself to the opinion, that the petitioner was greatly in the power of the respondents, from the time when the bills of costs were delivered, up to a time long subsequent to the settlement of the bills of costs.

NOKES  
C.  
WARTON.

It is alleged by the petitioner and denied by the respondents, that threats were used to induce the petitioner to settle the accounts as he did. I am disposed to give credit to the denial ; but the circumstances were such as to render any threat unnecessary. The petitioner must have known his position, must have felt the power under which he was, though he was not wholly subdued by it ; and I cannot suppose that solicitors, with such means in their hands as these respondents had, were not perfectly conscious of their power, or incapable of conveying a sense of it to the petitioner without actual threats.

I am further of opinion, that the bills delivered were not sufficiently explanatory. A bill commencing with an item of 15*l.* 10*s.* "for numerous attendances," and which contains several items of charge for particular \*attendances, and another item of 31*l.* 10*s.* for attendances called "innumerable," cannot, I think, be considered as a proper bill. It is not, I think, such a bill as would have been delivered by any solicitor to a client desiring to have the bill investigated, and in a situation to call for such explanation and details as he was entitled to have. These and some other items which have occurred to me in reading the bills, lead to a conclusion, that the respondents rather expected the petitioner to submit to the charges as they were made.

[ \*459 ]

With respect to the assistance which the petitioner had, the facts sufficiently show that Pirie and Browning were of considerable use to him. It was probably in consequence of their observations, that the respondents were induced to make a considerable deduction from the balance they claimed ; but the petitioner states

NOKES  
v.  
WARTON.

positively that he required further assistance,—a solicitor, or some other person who might discuss the matter with the respondents, and that the respondents refused their consent to that proposition. Without saying that the petitioner was entitled to an acquiescence in his proposition as made, it is very clear that he was entitled to a full statement of the particulars of charge, and to a proper investigation of each particular item; and I think that the respondents did not do all, which, under the circumstances, they ought to have done, to facilitate to the petitioner the exercise of that right.

[ \*460 ]

It is to be regretted that the observations and objections of Pirie and Browning were destroyed. The respondents had them in their possession for some time; and after they were thereby apprised that the bills were to a considerable extent erroneous, it was peculiarly \*incumbent upon them to take care that their client (particularly a man involved in difficulties and greatly in their power) was duly protected; and it was important for themselves to take care that the settlement which they were about to make, was subject to no future question. What they did, was to talk over the items in the Fleet Prison, where the petitioner's father and agent was a prisoner—propose to reduce the balance—obtain a memorandum of settlement prepared by their clerk, and then destroy the evidence of the objections. The declaration which one of the respondents is stated to have made, that, after the settlement then made, the bills of costs could not be questioned as to their correctness and propriety, was ill timed, and, I think, ill founded.

The first proposal as to the balance was to reduce it to 300*l.* in money. It being, as I conceive, clear, that the petitioner had no means of paying 300*l.* in money, it is difficult to regard the proposal as any thing but a means of hinting to the petitioner the power under which he was held. The discussion ended in a reduction to 250*l.* to be left on credit and charge. The petitioner was not so far subdued as to be unable to make any effort for relief; and he did obtain a reduction of 381*l.* 15*s.* 1*d.*, which is a very large sum to deduct on such an occasion. And it being admitted, as clearly it was, that a deduction was to be made from the balance, and the question then being to what extent, I think that the petitioner and respondents were on terms so unequal, as to make it very difficult to make any bargain which could be binding upon the petitioner in the absence of other assistance.

Browning seems to have given the petitioner reason to think that he was entitled to a reduction of 1,500*l*. If the objections had not been destroyed, we might have had some means of \*judging, whether the allowance made was fit to be considered as a fair compromise; but as the case stands, I am of opinion that the allowance was made, and the account settled, under circumstances which do not preclude the petitioner from having the bills of costs taxed.

I have come to this conclusion with the less regret, in consequence of having minutely examined the several items of the bills which are objected to by this petition. There are several which require much more explanation than has been given in the affidavits; there are others which are probably unjustly complained of. A man engaged in such speculations, and involved in such difficulties as the petitioner was, is too apt to require things to be done promptly at any cost, rather than suffer the delay which is necessary for a due observance of the ordinary rules of prudence and economy. I am not prepared to say that he is in all cases to be relieved from expenses not strictly necessary, which his own urgency has occasioned. But independently of cases of that kind, I think that there are in these bills some charges, which, from their nature and amount and under the circumstances stated in the affidavits the petitioner would have been entitled to have investigated, even if he had been held bound by the settlement.

I think that it must be referred to the taxing Master to tax all the bills of costs, and to take an account of what, if any thing, is due to or from the respondents in respect thereof. I think, however, that in taking the account, the petitioner ought to admit that the respondents have paid him, or on his account, the several sums in cash which are stated to have been so paid in the account; and that the respondents ought to be \*at liberty to explain, or state in detail, any of the items in the bills of costs.

NOKES  
C.  
WARTON.  
[ \*461 ]

[ \*462 ]

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ALLEN *v.* M'PHERSON.

(5 Beav. 469—485; S. C. 11 L. J. Ch. 59.)

[REPORTED on appeal to the House of Lords in 1 H. L. C. 191.]

1841.  
Nov. 2, 5, 12.

Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 469 ]

1841.  
Dec. 7.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 515 ]

## TURNER v. CORNEY.

(5 Beav. 515—518.)

Special decree in a bill for an account, where the accounts and vouchers were alleged, under special circumstances, to be beyond the control and power of the accounting party.

The plaintiff conveyed his property to trustees for the benefit of his creditors. The trustees who were authorised to employ an agent, committed the management of the property to an agent. The agent rendered his accounts to the defendants, and left England, taking with him the vouchers. The trustees being unable, from the absence of the documents, to furnish a satisfactory account, the plaintiff asked that they might be charged for what, without their wilful default, they might have received. The Court, however, in the first instance, made a special decree ordering a general account; and if, in taking the account, it should appear that the defendants could not render a satisfactory account by reason of the non-production of the documents and vouchers, it was referred to the Master to inquire, whether it was by the neglect or default of the trustees that they were unable to render a better account, with liberty to state special circumstances.

In 1828, the plaintiff Turner and his partner Dodgin executed a creditor's deed, by which they assigned to Corney and Barrett their stock in trade and debts, upon trust to collect, and after payment of the costs, to divide the produce proportionately between the scheduled creditors, and pay the surplus to the assignors. Corney and Barrett covenanted to perform those trusts, and keep and produce proper accounts. They were authorised to employ one or more person or persons to inspect and make out the accounts of the said partnership business, and to collect and get in the debts and effects.

The plaintiff went abroad, where he remained ten years, and after his return he filed this bill, seeking to have an account of the receipts and payments of the trustees, and to charge them with an alleged surplus.

The defendants stated that they did not take possession of the property, books, and accounts, but committed the entire active management and disposition of the trust premises to Mr. Willats, a perfectly competent person for that purpose, who was approved of by the plaintiff as such agent. That Willats realised the property, and distributed the produce amongst the creditors, as set forth in his account (which was set out in a schedule to the answer), leaving after payment in full of the debts, a balance of 58*l.* due to the defendants or their agent.

They stated that Mr. Willats relinquished business, and went to reside abroad some years ago, and was permanently resident abroad,

[ \*516 ]

and had left with the defendants no papers, accounts, or books whatever relating to the said trust premises.

TURNER  
v.  
CORNEY.

They set forth the account, and stated that they were unable to set forth any further account, and that they had not in their possession any papers, &c. relating to the accounts.

By amendment, the plaintiff insisted that the accounts were defective and imperfect, and that credit was not given for the fair value of the stock and effects, and that such accounts did not include many of the credits of the partnership, and that many good debts were omitted.

The cause coming on for hearing,

*Mr. Wilbraham*, for the plaintiff, asked for a decree of what without the wilful default of the defendants, the trustees, they might have received, and of the application thereof.

*Mr. Tinney* and *Mr. Parry*, *contrà*, did not resist a general account, but insisted that the plaintiff was not entitled to the particular decree asked.

#### THE MASTER OF THE ROLLS:

[ 517 ]

The question is, whether the case now brought forward entitles the plaintiff to the decree which he asks. It is very possible he may be entitled ultimately.

Where the books and documents relating to the account are, and whether they can be produced does not appear, and the defendants have not rendered a satisfactory account by their answer.

If I directed a common account, the plaintiff would not have what he is entitled to. I think I am not at present in a situation either to charge the defendants in the way asked, or to exonerate them. There must be some inquiry, if by the neglect or default of the trustees they cannot render a better account. Some caution must be used in drawing up the decree.

I must observe, that trustees who take on themselves the management of property for the benefit of others have no right to shift their duty on other persons; and if they employ an agent, they remain subject to responsibility towards their *cestuis que trust*, for whom they have undertaken the duty.

ABSTRACT OF DECREE.—Refer it to the Master to take an account of the property assigned, and of the proceeds received by the defendants, or by any person by their order, or for their use, and



TURNER  
r.  
CORNEY.

of the application thereof, and of all monies properly expended in and about the execution of the trusts; and if, in taking the account, it shall appear that the defendants cannot render a satisfactory account, by reason of the non-production of the documents and \*vouchers, refer it to the Master to inquire whether it is by the neglect or default of the trustees that they are unable to render a better account, with liberty to state special circumstances.

[ \*518 ]

NOTE.—The case was afterwards compromised, while in the Master's office.

1842.  
Dec. 6.

### ALEXANDER v. ALEXANDER (1).

(5 Beav. 518—520.)

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

[ 518 ]

A testator, by his will, gave two thirds of his residue to his eldest son, with a gift over in case he died under twenty-five and unmarried; and he gave the remaining one-third to his second son, in similar terms. By a codicil, he revoked so much of his will as related to the distribution of his residue, and gave to his second son 20,000*l.* sterling, in lieu of his one third of the residue, and he appointed his eldest son residuary legatee: Held, that the gift of the 20,000*l.* was absolute, and not subject to the same limitations as the one third of the residue.

THE testator, by his will dated in 1836, gave his residuary estate to trustees, as to two thirds in trust, until his son Caledon D. Alexander should attain twenty-five or marry, to apply such part of the interest as they should think fit in his maintenance, and to pay over the capital to him "when and immediately after he should have attained the age of twenty-five, or be married;" and in case of his death under twenty-five and unmarried, the testator gave the two thirds upon the same trusts as were afterwards declared of the remaining one third.

The testator then gave the remaining one third upon trust, until the plaintiff, his son, Josiah B. C. Alexander, should attain twenty-five or marry, to apply such part of the interest as they should think proper towards his maintenance &c.; and the testator authorised the trustees to advance him any sum not exceeding 10,000*l.*, towards his advancement in the world, whether he \*should or not have attained twenty-five or be married; and he directed them to pay over the capital, "when and immediately after he should attain his age of twenty-five years or marry." The one third was given over in case of the death of the plaintiff under the age of twenty-five and unmarried, upon the trusts declared concerning the other two thirds of the residue.

[ \*519 ]

In 1838, the testator made a codicil to his will, which was as follows: "By this codicil to my last will and testament, made at Paris this 24th day of November, 1838, I do hereby revoke so much of my said will as relates to the distribution of the residue of my estate. And I do hereby bequeath to my second son Josiah a legacy of 20,000*l.* sterling in lieu of his one third share of the said residue, and do appoint my eldest son Caledon to be my sole residuary legatee."

ALEXANDER  
ALEXANDER.

The plaintiff was still under the age of twenty-one, and by this bill he claimed to be entitled to the 20,000*l.* absolutely, without any restriction.

*Mr. Tinney and Mr. Beales* for the plaintiff. \* \* \*

*Mr. Pemberton and Mr. Gardner* for the executors.

*Mr. Kindersley and the Honourable F. Bruce* for Caledon D. Alexander :

The gift by the codicil is a substitution for that given by the will, and is therefore subject to the same incidents and limitations, so that in the event of the death of the plaintiff under twenty-five unmarried the legacy will go over. [They cited *The Earl of Shaftesbury v. The Duke of Marlborough* (1).]

THE MASTER OF THE ROLLS :

[ 520 ]

There is no doubt that this is an absolute legacy. The testator has revoked so much of his will as relates to the distribution of the residue of his estate. The whole of this disposition is therefore gone. He says, I have given the residue, subject to a contingency, I revoke the gift entirely, and in lieu I give an absolute interest in 20,000*l.*

### STURCH *v.* YOUNG.

(5 Beav. 537 ; S. C. 12 L. J. Ch. 56.)

Where a notice of motion embraces two objects, and the principal one fails, the party moving must pay the costs of the motion.

THIS was a motion on behalf of the plaintiff for the production of documents, and for a receiver. It was stated that the plaintiff was a mortgagee, having the legal estate vested in him, and the grounds on which the receiver was asked were, that the tenants were very numerous, and that there was a difficulty in collecting the rents.

(1) 40 R. R. 129 (7 Sim. 237).

1842.  
Nov. 25.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.

[ 557 ]

STURCH  
v.  
YOUNG.

*Mr. Renshaw*, for the plaintiff, argued, that under these circumstances, the mortgagee, if he took possession, would be entitled to appoint a receiver, and charge the expenses against the mortgagor, and that, therefore, it would be more satisfactory to have the security of a receiver appointed under the Court.

*Mr. Pemberton*, for Mrs. Young, who was entitled to an annuity subject to the charge, did not oppose.

*Mr. Younge, contra :*

I do not resist the production of the documents, but as to the other part of the motion, a legal mortgagee has no right to come here for a receiver. He is at liberty, if he pleases, to take possession.

(THE MASTER OF THE ROLLS : I think you are right on that point.)

Then the plaintiff, having joined two objects in his notice of motion, and having failed in the principal one, ought to pay the costs of the application.

The MASTER OF THE ROLLS, on that ground, thought the plaintiff ought to pay the costs.

1842,  
Nov. 19, 21,  
22, 23.  
1843.  
Jan. 12.

Rolls Court.

Lord  
LANGDALE,  
M.R.

[ 558 ]

## BYNG v. LORD STRAFFORD.

(5 Beav. 558—573; S. C. 12 L. J. Ch. 169.)

If a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees, in a manner incompatible and inconsistent with the free enjoyment of the property plainly given to the first, will not authorise the Court to alter the effect of the words by which that property is given.

The first legatee of a *quasi* estate tail in personalty takes the absolute interest, notwithstanding a manifest and avowed intention to give a succession of limited interests.

If an absolute interest be given upon an express condition, which may be lawful in itself but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest, for the purpose of giving effect to the condition, but declares the condition void for the purpose of supporting the absolute interest.

Where the condition intended to be annexed to a gift is inconsistent with and repugnant to the gift itself, the condition is held to be wholly void.

[THE decision of the MASTER OF THE ROLLS in this case was affirmed on appeal by the House of Lords under the title of *Hoare*

v. *Byng* as reported in 10 Cl. & Fin. 508, to be contained in a later volume of the Revised Reports. The judgment of Lord LANGDALE, M. R., at the Rolls Court, contains some general observations upon the points mentioned in the above head-note, which may be conveniently inserted here from the report in 5 Beavan.

BYNG  
v.  
LORD  
STRAFFORD.

In the course of his judgment the MASTER OF THE ROLLS said :]

It is undoubtedly the duty of the Court to give effect to the intention of testators, as far as the rules of law will permit; but if a testator uses words, which by their plain import give an absolute estate, the circumstance of his giving the same absolute estate to a succession of legatees in a manner incompatible and inconsistent with \*the property plainly given to the first, will not authorise the Court to alter the effect of the words by which that property is given.

[ 566 ]

[ \*567 ]

The first legatee of a *quasi* estate tail in personalty has the absolute interest, notwithstanding a manifest and avowed intention to give a succession of limited interests. If an absolute interest be given upon an express condition, which may be lawful in itself but is incompatible with the free enjoyment of the property, the Court does not modify the absolute interest, for the purpose of giving effect to the condition, but declares the condition void, for the purpose of supporting the absolute interest. Where the condition intended to be annexed to a gift is inconsistent with, and repugnant to the gift itself, the condition is held to be wholly void : *Bradley v. Peixoto* (1) ; *Ross v. Ross* (2).

If a testator devise to one in fee, and if he dies without any heir to a stranger in fee, this is said to be an attempt to mount a fee upon a fee, and the devise over is void in law : *Tilbury v. Barbut* (3).

And if a testator were to give all his real estate to A. in fee, and then to B. in fee, and afterwards to C. in fee, or to give all his personal estate to A., and then to B., and afterwards to C., there is no rule of construction authorising the Court to restrict the estate given to A. to a life interest, for the purpose of giving effect to the gifts to B. and C.

The construction which, in cases of this kind, disregards the gifts over or the intended succession, is always \*open to objection in argument, on the ground that the words of limitation over are rejected, and the answer to the objection is, that the words are not rejected against the rule that every word in a will shall, if

[ \*568 ]

(1) 4 R. R. 7 (3 Ves. 324).

(3) 3 Atk. 617.

(2) 20 B. R. 263 (1 Jac. & W. 154).

BYNG  
r.  
LORD  
STRAFFORD.

possible, have a meaning, but because the testator has attempted to do what the law will not permit, or has made dispositions of property which are inconsistent with each other.

\* \* \* \* \*

1842.  
Feb. 22.  
May 10.

## THE DEAN AND CHAPTER OF ELY *v.* BLISS.

(5 Beav. 574—585.)

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 574 ]

[REVERSED on appeal by Lord St. LEONARDS, L. C., as reported in 2 D. M. & G. 459.]

1842.  
Nov. 4, 24.

## EZART *v.* LISTER (1).

(5 Beav. 585—588; S. C. 12 L. J. Ch. 10.)

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 585 ]

Liability of a party acting as a solicitor in a proceeding in which funds are wrongfully obtained out of Court.

If a solicitor, knowing that money in Court belongs to one person, presents a petition and obtains payment to another, he is personally responsible. The principle applies if he has merely a knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact.

PATTY GOODILL was entitled, for life, to an annuity of 20*l.*, payable out of the estates of the testator in the cause. The assets were administered in this Court, and provision was made for the payment of this annuity by setting apart a sum of 666*l.* 6*s.* 8*d.* Consols for the purpose. By the decree on further directions, in 1810, the other funds in Court were apportioned, and the residue was ordered to be paid to William Goodill, who also was entitled to the 666*l.* 6*s.* 8*d.*, subject to the life interest of Patty Goodill.

It was afterwards ascertained that the plaintiffs, the trustees, had a charge of 263*l.* against the assets, for expenses incurred by them, and by an order made in March, 1815, it was referred to the Master to tax all parties their costs; and it was ordered that 108*l.* 4*s.* 11*d.* Annuities then in Court, together with a sum of 4*l.* 7*s.* 9*d.* cash, should be applied in payment (so far as those sums would extend) of the costs; and it was declared that the sum of 263*l.*, which had been reported due to the plaintiffs, was a charge upon the sum of 666*l.* 13*s.* 4*d.* 3 per cent. Annuities, set apart to answer Patty Goodill's \*annuity of 20*l.* Liberty was given to the plaintiffs to apply on the death of Patty Goodill.

No stop order was obtained by the plaintiffs.

(1) *In re Dwyer's Trusts* (1889) 41 Ch. D. 178, 58 L. J. Ch. 315, 60 L. T. 491.

[ \*586 ]

The costs were not taxed, and the sum of 108*l.* 4*s.* 11*d.* stock and 4*l.* 7*s.* 9*d.* cash remained in Court.

EZART  
v.  
LISTER.

Patty Goodill died in January, 1842, and in May following, William Goodill presented a petition, stating the proceedings in the cause up to the order of 1810, but omitting that of 1815. An order was made on that petition in May, 1842, whereby the sum of 108*l.* 4*s.* 11*d.* Reduced Annuities, and a sum of 94*l.* 14*s.* 9*d.* cash, which had arisen from the dividends thereon, and also the sum of 666*l.* 13*s.* 4*d.*, were ordered to be paid to William Goodill.

Messrs. A. and B. were not solicitors in the cause, but they acted as the solicitors of William Goodill, in the matter of the petition.

A petition was now presented by the personal representative of the surviving trustee, praying either that William Goodill and Messrs. A. and B. might be ordered to transfer into Court the sums obtained out of Court in May, 1842, and that the same might be applied in payment of the costs directed to be paid by the order of March, 1815, together with interest and the costs of the application, or that William Goodill and Messrs. A. and B. might be ordered to pay those costs, &c.

*Mr. Pemberton* in support of the petition.

*Mr. Kindersley* and *Mr. Heberden*, *contrà*, on behalf of Messrs. A. and B.

William Goodill did not appear.

#### THE MASTER OF THE ROLLS:

[ 587 ]

I am of opinion that under the circumstances I cannot grant the order which is now asked. There is no doubt of the principle, that if a solicitor, knowing that money which is in Court belongs to one person, presents a petition in the name of another, and obtains payment, he is personally chargeable with the amount. I go further, if he has not the knowledge of the fact, but has knowledge of circumstances which, if duly considered, would lead to a knowledge of the fact, he must be made personally answerable for that loss, which his want of due consideration has occasioned. It is very rarely that such cases come before the Court. I only recollect one which came before Sir WILLIAM GRANT, who said that the solicitor had better pay the money at once, and it was done.

In this case there are several peculiar circumstances which have been necessarily commented upon.

EZART  
v.  
LISTER.

His Lordship (after detailing the circumstances of the case, and the grounds on which the petitioner rested this claim as against Messrs. A. and B.) said: The question is, whether, under the circumstances, I am to impute to the solicitors such a knowledge of the charge upon the fund in Court, or of circumstances, which, if duly considered, would have led to a knowledge of that charge, as ought to induce me to say that they must be charged with the loss. I do not think that I have before me sufficient evidence of established facts to compel me to impute to these gentlemen such a knowledge of the circumstances, as to require me to say that they are personally liable. On the whole I do not think I can make them personally liable, although these funds ought never to have been paid out in the way they have been.

[ 588 ]      The order which is asked for against William Goodill must be granted, and the petition must be dismissed as against Messrs. A. and B. without costs.

1842.  
Dec. 15.

ALDEN v. FOSTER (1).

(5 Beav. 592.)

Rolls Court.  
Lord  
LANGDALE,  
M.R.

If a mortgagee receives rents after the Master's report and before the day appointed for payment, there must be a further reference and account, and a new day appointed for payment.

[ 592 ]      MR. PEMBERTON and Mr. Toller, moved to make absolute a decree for foreclosure.

Mr. Bacon, *contra* :

Since the day appointed by the Master for payment, the mortgagee has received rents, and the balance due has thus undergone a variation. The mortgagee is not therefore entitled to a foreclosure.

THE MASTER OF THE ROLLS :

I have already had occasion to consider this point (2). A certain sum is found to be due on a particular day, and payment of that sum is directed to be then made, and in default the party is to be foreclosed. The mortgagee having in the interim varied the account, there must be a new reference to the Master, and a new day fixed by him for payment.

(1) *National Permanent Mutual Benefit Building Society v. Raper* [1892] 1 Ch. 54, 61 L. J. Ch. 73.      (2) *Garlick v. Jackson*, 55 R. R. 33 (4 Beav. 154); and see *Geldard v. Hornby*, 58 R. R. 60 (1 Hare, 251).

## JOHNSTON v. TODD.

(5 Beav. 597—606.)

1848.  
Feb. 14, 15,  
20.

Rolls Court.

Lord  
LANGDALE,  
M.R.

[ 597 ]

Observations on traditionary evidence in pedigree cases, and its fallibility. It is not to be wholly rejected because error is proved as to part.

The veracity, or even accuracy, of an ignorant and illiterate person, is not to be conclusively tested by comparing an affidavit made by him, with his *virâ voce* testimony; discrepance between them is not conclusive against his testimony.

Observations on the value of testimony given by affidavit. When the witness is illiterate and ignorant, the language is not his own, but that of the person preparing the affidavit; being taken *ex parte*, it is almost always incomplete, and often inaccurate.

[In this case the MASTER OF THE ROLLS made the following general observations upon the points mentioned in the above head-note:]

When family reputation, or declarations of kindred made in a family, are the subject of evidence, and the reputation is of long standing, or the declarations are of old date, the memory as to the source of the reputation, or as to the persons who made the declarations, can rarely be characterised by perfect accuracy. What is true may become blended with, and scarcely distinguishable from something that is erroneous; the detection of error in any part of the statement necessarily throws doubt upon the whole statement, and yet all \*that is material to the case may be perfectly true; and if the whole be rejected as false because error in some part is proved, the greatest injustice may be done. All testimony is subject to such errors, and testimony of this kind is more particularly so; and however difficult it may be to discover the truth, in cases where there can be no demonstration and where every conclusion which may be drawn is subject to some doubt or uncertainty, or to some opposing probabilities, the Courts are bound to adopt the conclusion which appears to rest on the most solid foundation.

[ 599 ]

[ \*600 ]

\* \* \* \* \*

I do not think that the veracity or even the accuracy of an ignorant and illiterate person, is to be conclusively tested by comparing an affidavit, which he has made, with his testimony given upon an oral examination in open Court. We have too much experience of the \*great infirmity of affidavit evidence. When the witness is illiterate and ignorant, the language presented to the Court is not his: it is, and must be, the language of the person

[ \*601 ]



JOHNSTON  
v.  
TODD.

who prepares the affidavit; and it may be, and too often is, the expression of that person's erroneous inference as to the meaning of the language used by the witness himself; and however carefully the affidavit may be read over to the witness, he may not understand what is said in language so different from that which he is accustomed to use. Having expressed his meaning in his own language, and finding it translated by a person on whom he relies, into language not his own, and which he does not perfectly understand, he is too apt to acquiesce; and testimony not intended by him is brought before the Court as his. Again, evidence taken on affidavit, being taken *ex parte*, is almost always incomplete and often inaccurate, sometimes from partial suggestions, and sometimes from the want of suggestions and inquiries, without the aid of which, the witness may be unable to recall the connected collateral circumstances, necessary for the correction of the first suggestions of his memory, and for his accurate recollection of all that belongs to the subject. For these and other reasons, I do not think that discrepancies between the affidavit and the oral testimony of a witness are conclusive against the testimony of the witness.

[ \*602 ]

It is further to be observed, that witnesses, and particularly ignorant and illiterate witnesses, must always be liable to give imperfect or erroneous evidence, even when orally examined in open Court. The novelty of the situation, the agitation and hurry which accompanies it, the cajolery or intimidation to which the witness may be subjected, the want of questions calculated to excite those recollections which might clear up every difficulty, and the confusion occasioned by cross-examination, as \*it is too often conducted, may give rise to important errors and omissions; and the truth is to be elicited not by giving equal weight to every word the witness may have uttered, but by considering all the words with reference to the particular occasion of saying them, and to the personal demeanour and deportment of the witness during the examination.

All the discrepancies which occur, and all that the witness says in respect of them, are to be carefully attended to, and the result, according to the special circumstances of each case, may be, either that the testimony must be altogether rejected on the ground that the witness has said that which is untrue, either wilfully or under self-delusion, so strong as to invalidate all that he has said, or else the result must be, that the testimony must, as to the main purpose, be admitted, notwithstanding discrepancies which may have arisen

from innocent mistake, extending to collateral matters, but perhaps not affecting the main question in any important degree.

JOHNSTON  
v.  
TODD.

[The remainder of the judgment deals with the special circumstances of the particular case.]

## TUCKER v. BOSWELL.

(5 Beav. 607—609.)

1843.  
Feb. 21.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 607 ]

A testator directed his residuary personal estate to be invested in land from time to time and at all convenient opportunities, and in the meantime to be accumulated: Held that the tenant for life of the land was entitled to the interest of the uninvested personalty, as from a year from the testator's death.

In the same case, the testator gave 400*l.* a year to his wife if she recovered her mental faculties, otherwise 200*l.* a year, to be paid out of his Government stock; and he directed, as soon as conveniently might be after her death, the investment of the stock out of which the annuity was payable, in land to be conveyed in strict settlement. The wife did not recover: Held that the extra 200*l.* a year became part of the residue to be invested, and did not belong to the tenant for life.

THE testator gave the residue of his personal estate to trustees, upon trust to pay his wife an annuity of 400*l.* a year for life, if she should recover her mental faculties, and until that event, upon trust to apply for her use an annuity of 200*l.* a year; the said annuity of 400*l.* or 200*l.* (as the case might be) to be paid out of the dividends on the Government stock standing in his name at the Bank of England; and after directing his leaseholds to be sold, he directed that the purchase-money for the said leasehold premises, together with the residue of his personal estate not disposed of or applied for the purposes thereinbefore mentioned, should be laid out and invested, from time to time, and at all convenient opportunities, by his trustees in the purchase of lands and hereditaments in England of freehold tenure, which should be conveyed and assured unto his trustees and their heirs, upon the like trusts as were thereinbefore declared with respect to his freehold estates; and upon further trust that his trustees should, as conveniently as might be after the decease of his said wife, lay out and invest the stock, out of the dividends of which her said annuity should have been payable, in the purchase of freehold lands and hereditaments in England, to be conveyed and assured upon the like trusts as were directed with respect to the other lands to be purchased; and until proper and eligible purchases could be made, he directed his trustees to lay out

TUCKER  
v.  
BOSWELL.  
[ \*608 ]

the \*produce of the sale of his said leasehold house, together with any other trust monies in their or his hands not producing interest, in their names in Government stocks or funds of Great Britain; and should, until such purchases of freehold property should have been made, as aforesaid, in like manner lay out and invest the interest, dividends, and annual produce of his said residuary personal estate, as and when the same interest, dividends, and produce should be received, and accumulate the same in the nature of compound interest.

The real estates were devised to one for life, with remainders over.

The testator died in 1826.

His widow died in 1835, without having recovered, so that only 200*l.* a year had been applied to her use.

The questions were, first, whether the tenant for life of the freeholds was entitled to the income of the personal estate uninvested, as from twelve months from the testator's death, or whether it ought to be accumulated, so as to form part of the capital to be invested; and, secondly, whether the 200*l.* a year (being the surplus produce of the fund set apart to answer the wife's annuity, after payment for her use of the annuity of 200*l.* a year), formed part of the income of the tenant for life, or part of the capital to be invested.

*Mr. Pemberton and Mr. Rogers, for the plaintiff.*

*Mr. Tinney and Mr. A. Austen, for the tenant for life [cited Parry v. Warrington (1), Sitwell v. Bernard (2), Entwistle v. Markland (3), and other cases:]*

[ 609 ]

Secondly, that the particular object of the testator in directing the investment to continue in the funds, was for securing to the widow the annuity to which she might be entitled under the will; but that the general object was to invest the whole available residuary estate in land for the benefit of the tenant for life, and those in remainder. That, consequently, when the particular object had been satisfied, the remainder of the fund must be considered invested, and the interest would then belong to the tenant for life.

*Mr. Romilly and Mr. Willcock, for other parties.*

(1) 22 R. R. 264 (6 Mudd. 155).  
(2) 5 R. R. 374 (6 Ves. 520).

(3) 5 R. R. 388 (6 Ves. 528, *u.*).

The MASTER OF THE ROLLS held, that the tenant for life was entitled to the income of the uninvested personalty as from one year from the testator's death : but that the 200*l.* a year became part of the general residue to be invested, and that the tenant for life was entitled to the income only of it.

TUCKER  
v.  
BOSWELL.

### HAY v. BOWEN (1).

(5 Beav. 610—617; S. C. 12 L. J. Ch. 78; 6 Jur. 1119.)

A bill was filed for the administration of the testator's estate, by a party entitled to a contingent reversionary interest, and a decree for an account was obtained. Before thereport, the plaintiff's interest wholly failed : Held, that the plaintiff was not entitled to his costs of suit either as against the defendants or the fund, and a petition for the purpose was dismissed with costs.

A sole plaintiff whose interest failed pending a reference to take the accounts, was restrained from proceeding further in the suit.

1842.  
Dec. 22, 23.  
Rolls Court.  
Lord  
LANGDALE,  
M.R.  
[ 610 ]

In 1835, Alfred Farr became insolvent, and the plaintiff Hay was appointed his assignee. At the time of his insolvency, he was entitled, in right of his wife, to a contingent reversionary interest in the real and personal estate of the testator, and to which the defendant Bowen, (the testator's widow and executrix), was entitled during her widowhood.

In 1835, the assignee, under the authority of the creditors and the Insolvent Debtors' Court, filed his bill against the executrix, and against Farr, his wife, and the other persons interested in the property, for the administration of the estate, and to charge the widow with a breach of trust. In 1839, a decree was made for taking the usual accounts; the Master was to inquire if any and what advances had been made to the husband, and if any, and what settlement had been made on the marriage of Farr and wife with liberty to state special circumstances.

While the proceedings were going on in the Master's office Farr died, whereby all the interest of the plaintiff ceased. The plaintiff, nevertheless, continued prosecuting the accounts, and a petition was, in consequence, presented by the defendants to stay all proceedings. A cross petition was thereupon presented by the plaintiff, for payment to him of the costs of the suit, either by Mrs. Bowen personally, or out of the assets.

*Mr. Kindersley* and *Mr. Hubback*, for the plaintiff:

\* \* The decree operates for the benefit of all the parties, [ 612 ]

(1) *Seaton v. Grant* (1867) 36 L. J. Ch. 642.

HAY  
v.  
BOWEN.

plaintiff and defendants; after decree any of the defendants can prosecute the suit, and revive it if necessary. Here the defendants have claimed the benefit of the suit by their answer, and have adopted it; it is but reasonable, that taking the benefit, they should pay the costs of it.

*Mr. Pemberton and Mr. Steere, contra :*

The plaintiff has instituted this suit at his own risk, taking the chance of the insolvent surviving his wife. The effect of his death, is not to show that all the plaintiff's interest has ceased, but to prove that he never had any. On what principle then is a party, who has not and never had any interest, to be indemnified his costs out of a fund belonging to other persons?

\* \* \* \* \*

[ 613 ]

The suit, it is said, was for the benefit of the parties; far from it, they deprecate the litigation, no advantage has resulted from it, and they have themselves incurred expenses which they must bear. They have unwillingly been made parties to this litigation.

THE MASTER OF THE ROLLS :

I confess I do not see any good reason for doubting what order ought to be made on this petition. There is, I apprehend, nothing more clear than this, that to enable a plaintiff to obtain the relief which he asks by his bill, the interest which supports it, must be continuing at the time of the decree. If the interest has ceased to exist before the cause is brought on for hearing, it is utterly impossible for the Court to make any decree in his favour. I will not say that a case might not exist, but it must be a very extraordinary and special case indeed, in which the Court could make any order, upon the application of a person who clearly has no interest in the subject of litigation.

In this case the bill is filed by the assignee of the insolvent husband of a married woman, who, in right of his wife, had a reversionary interest in the testator's estate, the plaintiff's interest therefore, would entirely cease upon the death of the husband in the lifetime of the wife. The testator having by his will given the interest to the wife, the plaintiff, the assignee of the husband sought by his bill to establish his claim against the estate of the wife. The cause proceeds to a hearing, and at the hearing, one or more points are decided, and an account is directed. At the hearing, the

plaintiff had the same contingent and terminable interest which he had when he filed his bill, and an account was directed. The account proceeds to a certain extent, but pending the proceedings in the Master's office \*when the Master was about preparing his report, the husband died, leaving his wife surviving him; there was consequently an entire cessation of all interest on the part of the plaintiff. I do not understand why he should have thought it fit to proceed to the Master's office after the interest in respect of which he instituted the suit had ceased, nor how it was that the Master who had been informed of the state of things, permitted the plaintiff to proceed or take any steps in the cause. It has been stated at the Bar, and I dare say with truth, that the plaintiff's object in proceeding was, in some way or other (though not in a regular mode), to obtain his costs of the suit; he however made it necessary for the defendants to apply to the Court to stay the proceedings.

HAY  
v.  
BOWEN.

[ \*614 ]

I am by no means satisfied that the defendants, finding the suit prosecuted by a person who had no interest, might not have made an application of another kind, but the application they made (which they were entitled to) was to restrain the proceedings of a person who had ceased to have any interest whatever in the subject of the suit.

The question having arisen whether the plaintiff was entitled to his costs, he has brought it before the Court by petition. Just consider how the case would have stood if the plaintiff had been permitted to pursue the course he was adopting, and the parties had not intercepted him. Suppose he had brought the cause on for hearing on further directions; there would have been a plaintiff without any interest whatsoever in the matter, and I do not know what could have been done, but to dismiss the bill. I do not see what right the plaintiff could have had to claim costs up to the hearing of the cause, when confessedly he had no right whatever to any relief. The plaintiff having no interest whatever, and \*the sole object of the bill being to secure an interest which he expected to have, could not be entitled to costs. It is as well that such a course was not adopted, and that a petition which is a much shorter and less expensive mode of obtaining the decision of the Court on this question, was presented.

[ \*615 ]

The plaintiff says that there are special circumstances in this case, and, that for that reason, he ought to have the costs. Now I will not deny that cases may possibly be found, in which, having

HAY  
v.  
BOWEN.

regard to the interests of infants—of unascertained persons of various kinds—and other special circumstances, the Court has not thought fit to give to other persons the substantial benefit of the proceedings, without giving to the person whose interest has ceased the costs which he has incurred in procuring the benefit to others. There may possibly be such cases, but what the plaintiff says is, first, that the suit was for the administration of assets, and that it must, therefore, be assumed that such a suit must be beneficial to all persons interested in the estate. Secondly, that whether this be true as a general rule or not, yet I must assume it to be so in this particular case, because the defendants who are interested in the assets, finding this bill in prosecution, have by their answers claimed rights of their own, saying, if any relief be granted to the plaintiff, we, the defendants, desire to have a particular benefit resulting from it for ourselves; and, thirdly, it is said that the proceedings have proceeded in the Master's office so far as to charge the executrix.

[ \*616 ] I am of opinion that none of these circumstances entitle the plaintiff to any order in respect of his costs. \*In the first place, I do not agree that a bill filed for the administration of assets must, of necessity, be beneficial for all persons interested in the estate. It often turns out to be very much the contrary. I believe a bill for the administration of assets is, in a sense, generally beneficial for the executor, for he can get a complete exoneration in that way, and in no other; but if it be a benefit which the executor does not want, I do not think a suit for administration must necessarily be for the benefit of all persons interested in the assets; on the contrary, it may occasion much delay, expense, and vexation to them, in various ways, and notwithstanding the accurate mode in which the account is taken, it may be extremely prejudicial. In the next place, where a bill is filed by a person who desires to have an account of assets taken, charging the accounting parties with various defaults and breaches of trust, and the persons beneficially interested in the estate claim, by their answer, such benefit as they may be entitled to, I do not think that such a claim is to be considered such an approbation of the suit, or such an adoption of the proceedings as to subject either the assets or the executors to the costs of the suit. Thirdly, as to the personal charge against the executrix in the Master's office, I have no evidence whatever before me; I find the persons who would be entitled to the benefit of this charge joining in the petition to stay the proceedings, and

there is nothing in the former part of the proceedings which pledges them to an adoption of the suit, come of it what may.

Looking at the case altogether, I think that the plaintiff did file his bill, at the risk and upon the chance \*of his continuing to have at the hearing of the cause that right, which he very fairly alleged he had at the commencement. I must add, that I do not think it is by any means clear that if he had brought the cause to a hearing while his interest continued, he would have been entitled to costs; it does not appear to me to be clear, it is possible that he might, but that would depend upon circumstances, the evidence and the report; these are matters upon which I cannot now form a proper opinion.

The plaintiff's interest having altogether ceased, and there being no special circumstances in this case, which, in my opinion, entitle him to be reimbursed, by the other party, those costs which were incurred for his own benefit, I must refuse this application with costs. The other petition to stay proceedings does not ask for costs, and I must simply make an order according to the prayer of it.

HAY  
v.  
BOWEN,

[ \*617 ]

### ALTREE v. HORDERN (1).

(5 Beav. 623—628; S. C. 12 L. J. Ch. 76.)

1842.  
Dec. 15. 22.

*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 623 ]

After answer, and after liberty to amend had been refused, a suit abated by the death of the plaintiff. The executors filed an original bill of a similar nature. The Court stayed the proceedings in the second suit, until the costs in the first had been paid.

THE original bill was filed by two plaintiffs in 1836, to set aside a purchase, alleged to have been made by a trustee, thirty years ago. After all the answers had been filed, a special application was made to amend, which was refused. Both the plaintiffs died, and the suit having thereby become abated, the executors of the last surviving plaintiff, instead of reviving the suit, filed a new bill in respect of the same matters.

It was now, in effect, moved by the defendants in the second suit, that the second bill might be taken off the file for irregularity, or that the proceedings in the second suit might be stayed until the plaintiffs had paid the costs of the first suit. The notice of motion, however, was considered by the Court, as unnecessarily long and complicated.

(1) *Cook v. Hathway* (1869) L. R. 8 Eq. 612.



ALTREE  
v.  
HORDERN.  
[ 624 ]

The first suit was attached to the Court of the Vice-Chancellor of England, and the second was attached to the Rolls.

*Mr. Pemberton and Mr. Craig*, in support of the motion [cited *Chowick v. Dimes* (1).]

*Mr. Kindersley and Mr. S. James, contra.* \* \* \*

#### THE MASTER OF THE ROLLS:

[ \*625 ] This is a motion, made on the part of four of the defendants, that the bill may be taken off the file of this Court, with costs to be paid by the plaintiffs, or that all proceedings in the cause against the four defendants \*may be stayed until the plaintiffs shall have paid to the defendants their costs of the first suit.

The first bill was filed on the 22nd of November, 1836, by James Altree and Edward Stephen Altree. The answers of all the defendants, except one, were filed in 1837, and the answer of the remaining defendant was obtained on the 19th of January, 1838. In July, 1839, upon a motion made before his Honour the Vice-Chancellor of England, leave was given to the plaintiffs to amend their bill. That order was afterwards discharged by the Lord CHANCELLOR upon appeal, so that the plaintiffs not having liberty to amend their bill, were under the necessity either of proceeding with the bill as it then stood, or of filing a new bill, which they could only do, as I apprehend, by dismissing the first bill with costs. What they, however, did, under these circumstances, was to obtain leave, by an order of course, to amend the bill by adding parties, and they made that amendment.

In that state of things James Altree, one of the plaintiffs, died, and the suit was then sustained by the single remaining plaintiff, Edward Stephen Altree. After the death of James Altree the answer of the new defendants was, on the 24th of January, 1840, put in, and on the 17th of March, 1842, the surviving plaintiff Edward Stephen Altree died. The suit therefore became wholly abated. According to my understanding of the practice of the Court (as to which, however, I ought to speak with diffidence, because I understand there are different opinions upon the point), it was at that time competent for the defendants to move, as against the executors of the surviving plaintiff, that the bill might be revived within a limited time, or that the bill might be dismissed.

I do not think they would have obtained a more favourable order. They did not \*take that course, but seem to have waited to see what course would be adopted by those who succeeded to the interest of the deceased plaintiffs.

ALTREE  
v.  
HORDERN.  
[ \*626 ]

On the 17th of November, 1842, the executors of the surviving plaintiff filed a new bill, and I think that I can only treat it as such a bill as might have resulted from an amendment of the original bill; for the transaction, in respect of which the relief is sought by the second bill, is precisely the same, and although there are other specific portions of relief which are sought by it, yet, generally speaking, the relief is of the same sort as that asked by the first bill. It has not, in any way, been stated to me, that the second bill differs from a bill which might have resulted from an amendment of the original bill.

The second bill having been filed on the 17th of November last, the present application is made, and the question is, what ought now to be done. Considering the second bill to be such a bill as might have resulted from an amendment of the former bill if permission to amend had not been refused, it cannot surely be contended that those who are seeking to have the benefit of the former proceedings, and who found their allegations in the second bill upon the statements made in the answer to the first bill, are entitled to all the benefit of the former proceedings, and, at the same time, to lay them aside, in such a manner as to deprive the defendants of the opportunity of applying, in any stage of the cause, for relief in respect of the costs to which they have been subjected: nor can it be contended that the present plaintiffs are to be at liberty to adopt the former proceedings for their own benefit: that they are to come in and subject themselves to the jurisdiction of this Court, and seek its exercise as against the defendants, \*and yet that they are not to be subject to the costs of any thing that has hitherto been done. I confess nothing appears to me to be more reasonable than to ask that the plaintiffs may not be allowed to prosecute this new suit until they have paid the costs of the former suit; and unless I find some difficulty which I am not now aware of, I think there is in this Court sufficient jurisdiction to say that these plaintiffs shall not be at liberty to prosecute this suit, founded as it is upon the former suit, and seeking, though not precisely the same relief, yet relief founded on the same transaction, without first relieving the defendants from the costs which have been incurred in the former suit. I think it

[ \*627 ]

ALTREE  
v.  
HORDERN.

is no answer to say, that if that former suit had been prosecuted, the defendants might not have obtained costs,—very possibly it might be so. That suit might, after a simple bill of revivor, have been brought to a hearing, and the defendants might not have obtained costs, on the contrary, they might have had to pay the costs; nevertheless I think that the plaintiffs, who alone have the power of prosecuting the original suit, are not to be permitted to adopt these proceedings for their own benefit, and at the same time to abandon them to the detriment of the defendants, in such a manner as to deprive them of every opportunity of bringing under the consideration of the Court their right to the costs.

The order will be according to the first part of the notice of motion, which asks that proceedings in the second cause may be stayed until the costs of the first are paid; but, though I think it is very probable that no direct authorities can be found on the point, I shall suspend my opinion for a little while as to the other part of the notice of motion.

[The costs of the motion were refused on the ground that the notice of motion was unnecessarily complicated.]

## HARE v. HARE.

(5 Beav. 629—630; S. C. 12 L. J. Ch. 344; 7 Jur. 337.)

1843.  
*April 4.*  
*Rolls Court.*  
Lord  
LANGDALE,  
M.R.  
[ 629 ]

The testator appointed his widow and two other persons guardians of his children. By a codicil, he “left their care, charge, and education” to his widow. Held, that the appointment by the will of guardians was not revoked by the codicil.

Practice in a suit to establish a will where one of the witnesses is abroad.

By his will, dated in August, 1839, the testator nominated and appointed Julius Charles Hare and Marcus Theodore Hare executors of that his will, and, jointly with his wife, guardians of all his children except his son Augustus.

By a codicil, dated in January, 1842, the testator left the care, charge, and education of his three eldest children Francis George Hare, William Robert Hare, and Anna Frances Maria Louisa Hare, to his wife Anne Frances Hare, and he begged the executors named in his said will to pay the said Anne Frances Hare such sums of money, from time to time, as they should think necessary for the purposes aforesaid. As to his fourth child Augustus Hare, he placed him entirely under the joint management of the widow of

his late brother Augustus William Hare, and of his brother the Rev. Julius Charles Hare.

HARE  
v.  
HARE.

The bill, amongst other things, sought to establish the will as to the real estate. One of the witnesses was residing out of the jurisdiction. His handwriting was proved, as was also the fact of his being out of the jurisdiction, and the execution of the will was proved by the other witness.

The questions were, first, whether the will was sufficiently proved; and, secondly, whether, under the codicil, the wife had the sole guardianship of the three children.

*Mr. Kindersley and Mr. Hull*, for the plaintiff.

[ 630 ]

*Mr. Tinney* suggested the proper mode was, not to declare the will well proved, but to enter the evidence as read, and direct the trusts of the will to be carried into execution.

*Mr. R. W. E. Forster*, for the widow.

*Mr. Rolt*, for another party.

The MASTER OF THE ROLLS thought that such was the proper course, and said he was of opinion the appointment of guardian by the will was not revoked by the direction in the codicil, that the widow should have the care, charge, and education of the three children.

## HANBURY v. SPOONER (1).

(5 Beav. 630—631; S. C. 12 L. J. Ch. 434.)

1843.

June 13.

*Rolls Court.*

Lord  
LANGDALE,  
M.R.

An aged executor, who was incapacitated by bodily and mental infirmity from proving the will: Held, not entitled to a legacy given by the testator's will to him as executor.

THE testator appointed Mr. Ireland and three other persons the executors of his will, "and he gave to each of them the sum of 500*l*."

[ \*630 ]

The testator died in March, 1839.

With respect to Mr. Ireland the Master by his report found as follows: "Ireland died in 1841 in his eighty-second year, without having proved the testator's will, having been, during the whole period which intervened \*between the time of the said testator's death and his own death, from mental as well as bodily infirmity,

[ \*631 ]

(1) *Lewis v. Mathews* (1869) L. R. 8 Eq. 277, 38 L. J. Ch. 510, 20 L. T. 905.

HANBURY  
F.  
SPOONER.

wholly incapable of undertaking the duty of executor to the said testator."

The question was, whether Mr. Ireland was, under the circumstances, entitled to his legacy of 500*l*.

*Mr. James Parker*, in support of the claim [cited *Piggott v. Green* (1), *Harrison v. Rowley* (2), *Brydges v. Wotton* (3), and other cases].

*Mr. Pemberton Leigh*, *Mr. G. Turner*, *Mr. Simons*, *Mr. Chapman*, *Mr. Chandless*, and *Mr. Lewin*, for other parties, were not called on by

The MASTER OF THE ROLLS, who was of opinion that this legacy was not payable.

1841.  
Nov. 22.  
Dec. 25.  
  
Lord  
LYNDHURST,  
L.C.  
[ 27 ]

## RUNDELL v. LORD RIVERS (4).

(11 L. J. Ch. 27—31; S. C. 1 Ph. 88.)

It is not the practice in the Master's offices, on proof of a bond debt, in the administration of assets, to require that the affidavit should state the consideration; but it is sufficient to state generally that the party is indebted by bond in such a sum.

Where a reasonable case of suspicion is raised as to the validity of a bond, which it is necessary to prove in the Master's office, the Master, in the exercise of a fair discretion, ought to require proof of the consideration.

THE bill in this case was filed by certain specialty creditors of Sir W. Rumbold, deceased, against Lord Rivers, who was his personal representative. The decree, which was dated the 9th of November, 1838, was in the usual form, and on the 6th of May, 1840, Master Horne, who succeeded Master Martin, as the Master in the cause, made his report, finding that several persons had come in before his predecessor, and also before him, and proved debts by specialty, amounting in the whole, with interest, and including the plaintiffs' debt, to the sum of 25,894*l*. 8*s*. 3*d*., and which were set forth in the schedule to his report. Amongst other debts, the following were stated in the schedule, viz. first, a debt of 8,000*l*. due to Robert Gore and John Gore, on the bond of Sir W. Rumbold, dated the 29th of September, 1826, in the penalty of 17,000*l*., conditioned for the payment of eight several promissory notes for 1,000*l*. each,

(1) 39 R. R. 83 (6 Sim. 74).

(2) 4 R. R. 199 (4 Ves. 212).

(3) 12 R. R. 200 (1 V. & B. 134).

(4) This case is also reported in 1

Phillips, 88, but the report here taken from the Law Journal is the best report. -O. A. S.

RUNDELL  
 &  
 LORD  
 RIVERS.

making together 8,000*l.*, on or before the 2nd of October, 1827, and all interest, costs, charges, damages, and expenses, by reason of the non-payment thereof, and which were further secured by an indenture of assignment of a certain debt due to Sir W. Rumbold, deceased, from the late Marquis of Hastings, and 4,249*l.* 5*s.* 9*d.* for interest, in respect of such debt, from the 29th of September, 1829, making in the whole, a debt due to Robert and John Gore of 12,249*l.* 5*s.* 9*d.* Secondly, a debt of 2,500*l.* to Isaac Nicholson and Thomas Bushby, surviving partners of Isaac Nicholson, the elder, deceased, on the bond of Sir W. Rumbold, dated the 29th of September, 1826, in the penalty of 5,000*l.*, conditioned for payment of five several promissory notes of 500*l.*, making together 2,500*l.*, on the 2nd of October, 1827, and all interest, costs, charges, damages, and expenses, by reason of the non-payment thereof, and which was further secured by an indenture of assignment of a certain debt due to Sir W. Rumbold from the late Marquis of Hastings, and 1,826*l.* 0*s.* 6*d.* for interest, making in the whole a sum of 3,826*l.* 0*s.* 6*d.*, due to Isaac Nicholson and Thomas Bushby.

Exceptions were taken by the plaintiffs to the report, in respect of the two debts of 12,249*l.* 5*s.* 9*d.* and 3,826*l.* 0*s.* 6*d.*

[The principal question raised by these exceptions and] the facts relative to the bond, and the consideration for the same, are stated in his Lordship's judgment.

[ 28 ]

*Mr. Tinney* and *Mr. Toller*, in support of the exceptions. \* \* \*

*Mr. G. Turner* and *Mr. Loftus Wigram*, *contrà*, for Messrs. Gore. \* \* \*

*Mr. Stuart* and *Mr. Richards*, for Messrs. Nicholson & Co., contended that the exceptions were informal, and that the affidavit of debt was sufficient, inasmuch as the reason for taking a bond was to save the necessity at a future time of proving the consideration for the instrument.

THE LORD CHANCELLOR:

This is a case of exceptions, in point of form, and also in substance. With respect to the exceptions in point of form, the first was, that the affidavit of proof of this debt, which was a bond debt, did not state the consideration. The affidavit in a case of simple contract debt, as a matter of course, states the consideration, and it was the subject of controversy at the Bar, whether, according

[ \*29 ]

RUNDELL  
v.  
LORD  
RIVERS.

to the practice prevailing in the Master's office, the affidavit, where it is a bond debt, should also state the consideration. Mr. Smith's book was cited in support of the affirmative of the proposition, and, I believe, some other similar authority. On the other hand, it was stated, that that was not the practice in the Master's office; I felt it my duty, under such circumstances, to apply to the Masters, and I have obtained a certificate signed by eight of the Masters, in which they state it is not the practice in their offices, in the case of the proof of a bond debt in the administration of assets, to require that the affidavit should state the consideration, but that it is sufficient to state generally, that the party is indebted by bond in such a sum.

[His Lordship then dealt with a question as to the form of the exceptions, and continued his judgment as follows:]

[ \*30 ] Now, then, as to the facts. It appears that Sir William Rumbold carried on business in the East Indies, as a member of the house of Palmer & Co.; that house some years ago failed, and in the year 1823, Sir William Rumbold came over here, and remained in England till the year 1828, a period of five years, and it was during this \*interval that the transaction in question occurred. It is sworn distinctly by Captain Arabin, who is his brother-in-law, that during that time he was engaged in no mercantile or commercial business whatever; he had affairs to settle with the East India Company, the nature of which does not appear, but he says he was not engaged in any commercial or mercantile transaction during that period. In the year 1825, or 1826, it appears, he accepted bills of exchange to the amount of 10,500*l.*, but who were the drawers of those bills of exchange does not appear. Those bills were cancelled, in consideration of his giving promissory notes to Messrs. Nicholson & Co., and Gore & Co. severally, for the same amount. The payment of those promissory notes was secured by the bond in question, and further secured by the assignment of securities of property of Sir William Rumbold. Now, the first question arises on that deed of assignment; it has struck me as singular, that, in reference to the bills of exchange that were given up, and for which promissory notes were substituted, that dates are given, and the sums are given: Sir William Rumbold is stated to be the acceptor, but the drawers' names are not mentioned. It is natural in a regular transaction, where bills of exchange are given up, and promissory notes substituted, to be secured by a bond, that those bills of exchange should be more fully described, and

that the names of the drawers should have appeared in the instrument. In this case, the drawers' names do not appear. That, however, as a slight circumstance standing by itself, would not have very great weight; but it must not be disregarded in considering all the other circumstances of this case. Sir William Rumbold had solicitors, he was engaged in the settlement of some business; he had solicitors, viz. Messrs. Fladgate & Co. If this had been a regular transaction, it would have been very natural that he should have employed his solicitors to conduct it on his part. Messrs. Fladgate & Co. were not consulted; they knew nothing of the transaction; the whole affair was settled by Messrs. Wilde, Rees & Co., who were the solicitors for Messrs. Nicholson & Co., and so much so, that Mr. Rees, one of the partners of the house, was the subscribing witness to the execution of the assignment, and the bonds, by Sir William Rumbold.

In addition to that circumstance, this was a large sum of money, viz. 10,500*l.*, for which some bills of exchange were given; Messrs. Ransom & Co. were the bankers of Sir William Rumbold; no payment is made into the house of Ransom & Co. with respect to this transaction; there is no trace of any sum that can be referred to it, and yet it appears, that when 5,000*l.* was raised from the Westminster Life Insurance Company by Sir William Rumbold, that money was paid into the house of Ransom & Co.; and, further, he had been the borrower of 1,200*l.* on his bond, and that money was also paid into the house of Ransom & Co. These transactions were conducted in a regular way, but there is no trace in the bankers' books, which have been examined, as to the consideration given for those bills.

Now, it is suggested, on the part of the person opposing the claim, that this was a stock-jobbing transaction, and that those bills of exchange were given for the payment of differences; that might be legal or illegal; that was so stated, and properly stated, at the Bar. Let us see whether the case is made out, that it was probably a stock-jobbing transaction on these bonds, and these bills of exchange. Now, what appears? In the month of October, 1829, Mr. Young, of the house of Fladgate & Co., on the part of Sir William Rumbold, paid Mr. Wilde, who was the solicitor of Messrs. Nicholson & Co., a half-year's interest on these two bonds, (the two bonds appear to be connected together, although given to different parties,) that is, he paid the sum of 262*l.* 10*s.*, which is precisely the half-year's interest, at 5*l.* per cent. on those bonds: what took place on that occasion?

RUNDELL  
L.  
LORD  
RIVERS.



RUNDELL  
v.  
LORD  
RIVERS.

It was suggested, that the money might have been remitted from India for the payment of those bonds, through the house of Ransom & Co., and Mr. James Norris, the stock-broker, gave his written undertaking, signed by himself, to refund this 262*l.* 10*s.*, in case such a remittance should take place. So that it appears, that Mr. James Norris was connected with the transaction of these bonds: Mr. James Norris, the stock-broker, was connected with them. Payment to him was a payment to Nicholson & Co., or the payment to Nicholson & Co. was the payment to Mr. James Norris.

[ \*31 ]

Further, it appears, that on a particular \*occasion, Sir William Rumbold stated to Captain Arabin, that he had been engaged in stock-jobbing transactions with Mr. J. Norris (though he does not mention the name of Norris in paying differences), and that he had been over-reached: there was a conversation to that effect. It appears on a particular occasion, Captain Arabin was sent by Sir William Rumbold to settle stock differences. Now, with whom were those stock differences to be settled? With Mr. Wilde. Who was Mr. Wilde? The attorney for Nicholson & Co. and Gore & Co. Mr. Wilde was the party who received the half-year's interest, and handed over the undertaking of Mr. J. Norris to reimburse that half-year's interest, in case it should be remitted from India. That is another circumstance leading to a suspicion that, in real truth, these bills of exchange were given for a transaction of this kind. But, that is not all. After the death of Sir William Rumbold, and when the dispute arose with respect to the claim on these bonds, Mr. J. Norris called on Captain Arabin, in Paris, and told Captain Arabin, that he was responsible for the money due on these bonds, so that Mr. J. Norris, the broker, is connected with every part of this transaction, and a letter was written by Sir W. Rumbold to Mrs. Arabin, asking Captain Arabin to come over for the purpose of settling the transaction, before he, Sir William Rumbold, returned to England, as it was a hard bargain, and he thought he might be let off. Now, taking all these facts together, I must say, they raise a case of suspicion in my mind, strong enough to lead me to the conclusion, that in the exercise of a fair discretion, the consideration of these bonds should be investigated. In what mode that investigation should take place, must be left in the first instance for the Master to decide. It may or not be proper, in the course of such an investigation, that the parties should be examined. It is difficult for me to say by anticipation, because the parties were not

examined on a former occasion, that it will be necessary or proper to examine them now. A case may be made out, so as to render all examination unnecessary; on the contrary, the case may be so bare, that it may be necessary to examine the parties. It is not at all impossible that such a case may arise, for this reason: Mr. James Norris is dead, and Sir William Rumbold is dead, and the only persons who can throw light on this transaction are the parties themselves, and Mr. Wilde himself is their solicitor. Under these circumstances, I think, the justice of the case, considering the amount of debt, requires that the case should go back to the Master, that he may investigate the consideration. It is said, that this examination will be attended with expense. Whether it will be necessary or not, I cannot anticipate, still, it will not, as it appears to me, be attended with much expense, whether the examination of the parties be *vis à voce*, or by interrogatories; but considering the amount of the debt, and the nature of the transaction, I think justice requires that the case should go back to the Master. The exceptions therefore must be allowed.

RUNDELL  
v.  
LORD  
RIVERS.

## THE ATTORNEY-GENERAL v. BOSANQUET.

(11 L. J. Ch. 43—48.)

1841.  
June 20.  
July 4, 5.

Lord  
LYNDHURST,  
L.C.  
[ 43 ]

In charity cases, the Court will not interfere in the execution of the trusts where interference would be otherwise than beneficial to the charities; such a course being of great importance in deterring persons from instituting proceedings which cannot by any possibility have in view the benefit of the charities.

Although the Court holds a strict hand over charity trusts, to prevent their being the subjects of abuse, it is still its first duty to take care that in carrying out that principle, injury is not occasioned to the objects of the charity.

If, however, in the case of a charity information, the relator has acted in error, and supposed that he was doing his duty as an individual, by coming forward to protect the poor objects of the charity, the Court will be unwilling to deter others from bringing proper cases before the Court, by subjecting the relator to the costs of the proceedings.

*Secus*, where the relator has filed an information for the purpose of gratifying an ill spirit towards those who are made defendants thereto.

In October, 1827, an information was filed at the relation of Thomas F. Paris Fenner, \*against George Jacob Bosanquet and Francis Hill, as defendants thereto, which prayed a reference to the Master to approve of a scheme for the future regulation and government of the free school, and the affairs and concerns of the charity, the subject of the information; the removal of

[ \*44 ]

A.-G.  
v.  
BOSANQUET.

Francis Hill, as master of the free school, and the appointment of a new master in his place; that the defendant Bosanquet might be decreed to do all necessary acts for the purpose of restoring the free school to the school-house and premises originally used and appropriated for the same; and that he might be restrained from permitting or allowing the objects of the charity to be instructed at any other place than at the school-house and premises so originally appropriated for that purpose; and also from interfering in any manner in the appointment of a master of the free school, in the place of the defendant Francis Hill, or in the regulation or government of the said school, or the affairs or concerns thereof.

The following were the facts of the case: Sir Richard Lucy, Bart., by his will, in the year 1667, "gave 20*l.* a year for ever, out of certain of his manors, to be employed for the erecting and maintaining of a free school in Broxbourne, in the county of Hertford, for teaching the poor children of Broxbourne 'to read and write English;' the said school to be ordered in such manner as he had directed to his brother Francis Lucy, whom he appointed to nominate the schoolmaster, and after his death his son-in-law, Sir John Monson, and his heirs, so long as they should be owners of Broxbourne House, but in case Sir John Monson or his heirs should sell the same, then by his (the said Sir John Lucy's) heirs;" and by the will a power was given to distrain for the yearly sum of 20*l.*, whenever the same should be in arrear. Sir John Lucy died shortly after the date of his will, whereupon a dwelling-house and a school-room, capable of accommodating about thirty children, were built by the direction of the testator's brother, Francis Lucy, on a piece of freehold ground belonging to Sir John Lucy's estate at Broxbourne, but the house had been greatly enlarged and improved within the last thirty years. From the time of the establishment of the charity to about the year 1835, the school-room had been invariably used for the instruction of poor children of the parish of Broxbourne, as directed by Sir John Lucy's will, and the dwelling-house was appropriated for the residence of the master of the school, and the defendant Francis Hill, the present master of the school, was appointed by Lord Monson. Broxbourne House and estate, which comprised about five-sixths of the parish, were sold by John Lord Monson to Jacob Bosanquet in 1789; and on his death, the same came to his eldest son, George Jacob Bosanquet, the other defendant, by descent, who took up his residence in the parish in 1830. The objects of the charitable bequests had, for a

A.-G.  
v.  
BOSANQUET.

long series of years, been considered to be the male children of poor persons, being parishioners of the said parish, and the relator had been an inhabitant of Broxbourne for ten years past, and was the owner of property in that parish. From the year 1801, when Francis Hill was appointed the schoolmaster, to the year 1835, the number of poor children attending the school averaged from about six to twelve; and the rent-charge of 20*l.* had of late years been generally a good deal in arrear. In addition to the poor scholars, the master had, for many years past, been in the habit of receiving at the school (as his predecessor, Thomas Hill, was accustomed to do before him,) other scholars or pupils for remuneration, some of whom boarded in his house; but since Easter, 1835, no poor children of the parish of Broxbourne had been instructed upon the premises appropriated for the purpose of the free school, the whole of those premises having, since that time, been exclusively used by the master for the reception and instruction of his private scholars and pupils. The defendant Bosanquet was a trustee of certain alms buildings, situate not far from the free-school house, and containing a large room, called the chapel-room, which was conveniently adapted for the purposes of a school, and had been before used for a Sunday school, and also used occasionally before as a day school; and about Easter, 1835, the defendant Bosanquet gave permission for the chapel-room to be used temporarily as an additional school-room for the purposes of the free school, and proposed to the master, Francis Hill, that he should appoint an additional teacher for the purpose of educating the poor free scholars attending \*the chapel-room, and should pay the 20*l.*, the amount of his salary, to such additional teacher. Such proposal having been assented to by Francis Hill, a person qualified to discharge the duties of such additional teacher was proposed to Francis Hill by the said defendant Bosanquet, for his approval, and afterwards approved by the former. In consequence of Francis Hill's salary being in arrear for the last two years, the expenses of the teacher had been borne and paid by the defendant Bosanquet, who had also, at his own expense, provided books, stationery, desks, and other conveniences, and coals, for the purposes of the school. After the free school was removed to the chapel-room, gratuitous instruction was extended to the children, generally of the poorer classes, living in Broxbourne and its neighbourhood. The number of poor children latterly instructed at the chapel-room amounted to about forty, and came principally from Broxbourne parish, the others being the children of poor

[ \*45 ]

A.-G.  
BOSANQUET, v. inhabitants of Nazing and Wormley, adjoining parishes. The defendant, Francis Hill, had, at his own expense, laid out between 700*l.* and 800*l.* in repairing the said free-school house, in which he resided, the same, previously to such repairs being effected, being in a poor and dilapidated condition. There was no provision for the repairs of the school-house and premises, nor any provision for the support of the master of the school, beyond the school-house, and the rent-charge of 20*l.*; and the school, at no former period, had been more efficiently conducted than at the time of filing the information, and the poor of the neighbourhood had never before had such opportunities of receiving instruction.

The information contained charges of concert between the defendants, to support and defend the abuses alleged therein, and a charge that Francis Hill was acting entirely under the advice and direction of the other defendant and his solicitor, and was indemnified by the other defendant, with respect to all the matters complained of, and relating to the charity.

A letter, dated the 18th of March, 1836, and written and sent by the relator about that time to the defendant Bosanquet, was given in evidence, and contained intemperate language, and charges against the defendant of base misconduct on his part in the proceedings to which he had been a party, and by means whereof the poor children were instructed at the chapel-room instead of the school-room, and the master had been allowed to retain the use of the school-house for his boarders and private scholars.

*Mr. Treslove* and *Mr. Metcalfe* appeared in support of the information.

*Mr. Knight Bruce*, *Mr. J. Wigram*, and *Mr. Loftus Wigram*, for the defendants.

The following cases were cited: *The Attorney-General v. Hartley* (1), *In re Berkhamstead School* (2), *The Attorney-General v. Smythies* (3).

#### THE LORD CHANCELLOR:

On a former day I disposed of the case, so far as relates to the defendant George Jacob Bosanquet; and again, on looking over the pleadings and the evidence, I think it is one of the most extravagant cases I ever saw brought against any individual. It appears,

(1) 22 R. R. 167 (2 Jac. & W. 383).

(3) 45 R. R. 24 (2 My & Cr. 135).

(2) 13 R. R. 43 (2 V. & B. 134).

that when Mr. Bosanquet came into the parish, he found this charity existing there; but he certainly found the poor people deriving very little benefit from it. It appears, that the master, who received 20*l.* a year for instructing the poor children in reading and writing, to a certain extent performed that duty. He lived in the house appropriated to that purpose, and he received certain pupils; but it appears, that the number of poor children averaged, I think, from six to ten, or from six to twelve. Very little advantage, therefore, was derived by the poor people of that parish. Mr. Bosanquet, in the first instance, was naturally anxious, living in a parish of so large a proportion of which he was the proprietor, to extend to the poor people the benefits of instruction. He had to contend with a master in possession of the house, over whom he had no controul, and who was certainly very inadequately performing his duty to the poor of the parish; and it appears, that he did that which, in the result, has turned out to be highly beneficial to the parish. It appears, that he, very probably by his interference, \*induced the master to give up his 20*l.* a year, and removed the school to another place, called the chapel-room, which was the place where it was carried on at the time the original information was filed, because it was found that the room in the school-house was not adequate to receive the number of children that were sent to the school, and that a larger place was required. Another person was appointed to instruct the children, against whom this information rather attempts to raise the inference, than alleges or proves, that he is incompetent for the office to which he has been appointed—not alleging, and certainly not proving, that the party is incompetent to perform those duties, but wishing the fact to be inferred from the allegation contained in the information, that he has been a day labourer. Now, if the party be competent, the circumstance of his not having had the benefit of a better education, and of his having been employed in the laborious duties of a day labourer, only adds to the merit of the individual, who, with all these disadvantages, has qualified himself for the office he fills. There is no proof that he is not qualified; and I think the presumption is that he is perfectly well qualified, because the relator has entirely abstained from adducing any evidence that he is not. I must, therefore, assume, that that part of the case entirely fails; for I do not understand that any evidence is given disputing the qualification of Mr. French, who is instructing the poor children.

A.-G.  
v.  
BOSANQUET.

[ \*46 ]

Then the case stands thus: that Mr. Bosanquet appoints a

A.-G.  
r.  
BOSANQUET.

master, or causes a master to be appointed, whom I must assume to be qualified; and beyond all doubt this is done through the instrumentality of Mr. Bosanquet, who is not in a situation to make the appointment, not being connected with the charity, and therefore it is done only for the benefit of the parish. It is entirely gratuitous, and only to be attributed to a desire to promote the benefit of the poor parishioners. He first of all obtains the use of a room which is larger than the school-house, and that being obtained, he provides the means himself of fitting up the room for the purpose of having education carried on. The result of which is, that in that parish, instead of between six and ten, the average number of free scholars previously instructed, there are now between forty and fifty children deriving the benefit of instruction. And in addition to the parish having that advantage, those who are not in the situation of receiving instruction as matter of charity, have the advantage of instruction, in such a form as they are willing to obtain it for their children from the master, who lives in the house belonging to the school. The result, therefore, to the parish is, that there is a school by Mr. Hill, giving instruction to children whose parents are in a situation of life to pay for their education, and forty or fifty children have the benefit of free instruction, through the aid and instrumentality of Mr. Bosanquet. And this relator thinks this a proper case, or rather, (for I will not say that any one can think it a proper case,) he files an information, from the beginning to the end charging Mr. Bosanquet with having done this for views personal to himself, when, from the evidence, it appears that he had not any object in view but the benefit of the parish. A more discreditable proceeding, as far as Mr. Bosanquet is concerned, I have never seen. I have before said, that upon that ground, independently of the want of connexion of Mr. Bosanquet with this charity, this information must be dismissed, with costs, as regards that gentleman.

With regard to Mr. Hill, I have had much more doubt, because it is impossible to say that this charity has been administered, either before the time when Mr. Bosanquet lived there, or since that time, in a way which is creditable to Mr. Hill, the master. Mr. Hill, having received the appointment, (from whatever source he derived the appointment, is not now a matter of inquiry,) was put in possession of the house devoted to the purposes of the charity, and he had 20*l.* a year, the utmost extent to which the income of the charity could be carried, being a rent-charge of 20*l.*

a year, not capable of being increased. Commencing the history of this charity at the time at which the evidence begins, no doubt the charity was all but lost to the parish,—and lost to the parish from a cause which, in my experience in this Court, I have found continually operating to the prejudice of these charities, namely, by the master taking scholars into his own house, which has the effect of giving him an interest almost \*always adverse to the interest of those who are entitled to the benefit of the charity in the shape of instruction. That has frequently been the subject of observation in this place; and I do think it is unfortunate that so much indulgence has been shown to the schoolmasters who are found in that situation. Undoubtedly, great indulgence has been shown, when it appears that from long habit, from consent, and from the concurrence of those who have the power of administering and superintending the charity, such a practice had been permitted; and no doubt it would be matter of hardship towards any individual, at once to alter the establishment, so as to preclude him from deriving a benefit which may have formed part of his object in accepting his office, and from which he has derived the means of subsistence during the time he has been master, more particularly when, with a view to carry on that source of emolument to himself, he has expended a considerable sum of money in the improvement of the house, which he could not be expected to have done, if he had looked forward to a time when he should be deprived of that benefit. I think, in the *Manchester School* case, I had occasion to consider that subject; and although I never doubted that great injury arose to the charity from that state of things, yet looking at what had been done by my predecessors, I did not feel myself justified in putting an end to that liberty, the schoolmaster having expended a considerable sum in adapting the house to that mode of enjoying the appointment which he had received. But certainly in this case the charity was all but extinct. When there were only six or ten children out of a parish, which it now appears will produce forty or fifty such individuals, capable of receiving the benefit of the charity, it can hardly be said to have existed for any beneficial purpose. Whether it commenced with the present master, does not appear; but I find, that the present master was in the habit of confining the objects of the charity to those who were legally settled under the poor law in the parish. He might as well have adopted any other description of individuals as the proper objects of the charity. But that might not have been his own rule: he might

A.-G.  
 BOSANQUET

[ \*47 ]



A.-G.  
BOSANQUET.

have found it established before he came there, but it is undoubtedly an abuse, and calculated to deprive the parish of the benefit of the charity, whosoever may have introduced it. Under these circumstances, the question is, what shall be done with regard to Mr. Hill? and in considering that, I think it is my duty not to consider what is the best mode of executing the trusts of this charity, but in what way the parish will derive benefit from any interference on the part of the Court; because, although it is necessary that the Court should hold a pretty strict hand over trusts of this description, to prevent their being the subjects of abuse, it is the first duty of the Court to take care that, in carrying out that principle, injury is not done to those who are the objects of this charity.

Now, I cannot suggest to myself any mode in which this Court could advantageously interfere, under the circumstances, so as to benefit the parish, by extending the objects of this charity. Supposing I were to interfere, and to declare that the master was to receive these free scholars at his house: I do not find any evidence in the case that he has refused to do so, although certainly his interest is not to receive free scholars at his house. Nor do I believe that it would be advantageous to the poor children to go to his house, where they would have to go to an unwilling master (considering that the presence of those free scholars interferes with the other pursuits that he has), instead of going to a school, which I must suppose to be a well established and a well conducted school, where the free scholars are regularly received and instructed; that is all I could declare. I could only declare, that such was his duty; but he says, that he never has refused to receive them, but a system has been established which has entirely drawn the poor children, desirous of instruction, to another place in the same parish, where they receive instruction. Then, I find, that the whole income of the charity is applied to purposes of education, but that he does not perform the duty himself. The personal superintendence, of which Mr. Hill speaks, must, I think, be considered as of very little value, but I have no doubt, that the superintendence of Mr. Bosanquet is much more valuable to the poor children. Therefore, I consider, that Mr. Hill is in possession of the school-house, which he is employing for purposes of his own: though, undoubtedly, \*the result has been beneficial to the parish, as tending to the education of those who do not wish to be considered as objects of eleemosynary education. Then what I am asked to do, I cannot accede to, without feeling that I should be

doing injury to the parish. I think, under the circumstances, the course which the MASTER OF THE ROLLS has adopted, in the cases which have been referred to, is very wise and prudent, and quite consistent with the duty of the Court, that is, to withhold its interference, where it feels that its interference would be otherwise than useful. And this course is not only beneficial to the objects of the charity in the particular case, but, I think, it is of great importance in deterring persons from bringing these cases forward, when they could not by possibility have the benefit of the charity in view. If the Court feels that it cannot now interfere, so as to promote the benefit of those who are the proper objects of the charity, it must have been at least equally apparent to those who, being familiar with the transactions to which this information relates, must have had to consider that before the information was filed; and I can conceive nothing more prejudicial to the objects of these charities, than to hold out to those who may wish to put themselves in the situation of relators, or may wish to have the conduct of an information, that if they can find any single deviation from the strict line of duty prescribed in the foundation, they are safe in bringing it before the Court, without reference to the benefit which the objects of the charity may derive from the exercise of the jurisdiction of this Court. That might lead to a question with regard to the costs of the information, as far as regards the defendant Hill. If, from looking at the pleadings and the evidence, and taking as correct a view as I have been able, of the whole transactions from the commencement of the time to which this information relates, I could satisfy myself that the relator had acted in error—that he had supposed that he was doing a benefit to the parish, and that he thought it was his duty, as an individual, to come forward to protect the poor objects of the charity for their benefit; then, however difficult it might be to suppose that any man should come to such a conclusion, I should be unwilling to deter others from bringing proper cases before the Court, by subjecting him to pay the costs of these proceedings. But when I see that from the beginning to the end, he could not possibly have had the benefit of the objects of the charity in view, but that it was merely the gratification (and the very language of the information shows that)—that it was merely the gratification of an ill spirit towards those who are made the defendants in this information,—and when I cannot ascribe the filing of this information to any object tending to the benefit of those who are the objects of the charity, but to the gratification of

A.-G.  
v.  
BOSANQUET

A.-G.  
v.  
BOSANQUET.

private feeling, I think it is the duty of the Court to deter other parties from embarking in such a speculation. It is clear, that if I were to give the costs of this information, it must destroy the charity for years to come, for, however small the costs of the information might be (the costs of this information cannot be small,)—but however small the costs of the information might be, yet, when they are to be paid out of an income of 20*l.* a year, it is quite clear that it would absorb the whole income of the charity for many years to come. In such cases, therefore, it is the duty of the party to apply to the Court in the cheapest way he can, and that only in a case where it is clear that there is to be some benefit derived to the objects of the charity by the interference of the Court. In the present case, I think, it is apparent that no such object could have influenced the relator; and I think it is my duty, stating what I have stated, with reference to the conduct of Mr. Hill, to dismiss this information, with costs, as against both defendants. But I do not wish to part with this case without the reasons for the course I have taken appearing upon the order itself, that it may not hereafter be said, that upon this case being brought before the Court, the Court refused to interfere, and sanctioned what has taken place in this parish. I propose that the order shall be prefaced by this statement: “It appearing that the whole of the 20*l.* per annum has been paid by the defendant Hill, for the purposes of the charity, and that a place is now appropriated and used for the teaching of the poor children, the objects of the charity, more convenient than the school-house, occupied by the defendant Hill,” I dismiss the information, with costs.

1841.  
July 30.

Lord  
LYNDHURST,  
L.C.

[ 52 ]

## BATT v. ANNS.

(11 L. J. Ch. 52.)

A testator bequeathed as follows: “I leave T. B. under the protection of my wife A. P., to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said A. P. remains unmarried:” Held, that T. B. was entitled to maintenance out of the testator’s estate.

THE question in this case was, whether the plaintiff was entitled to have maintenance provided him out of the testator’s estate, under the following bequest, viz. “I, Thomas Parham, give and bequeath to my wife, Ann Parham, whom I make my sole executrix of this my last will and testament, the whole of my personal property, wheresoever and whatsoever, as long as the said Ann

Parham remains unmarried. If the said Ann Parham marries again, she shall pay, or cause to be paid, to my illegitimate child, Thomas Batt, the sum of 1,200*l.*, of lawful money of Great Britain, on the day of her marriage. I also leave the said Thomas Batt under the protection of the said Ann Parham, to be by her apprenticed and taken care of, and to be provided for to the best of her judgment, as long as the said Ann Parham remains unmarried."

BATT  
v.  
ANNS.

*Mr. G. Richards* and *Mr. Chandless* appeared for the defendant Ann Parham; and

*Mr. Rolt* for the plaintiff T. Batt.

The LORD CHANCELLOR, after stating the will, said, that after the decisions in *Foley v. Parry* (1) and *Kilvington v. Gray* (2), it was impossible to say that the testator's will did not entitle the plaintiff to the interposition of the Court, for the purpose of obtaining a maintenance out of the testator's estate; that the only difficulty of exercising the jurisdiction arose from not accurately knowing the extent of the gift; that a testator might undertake, if he chose, to discharge the debt of maintenance in favour of an illegitimate child; that in the present case, the testator had marked the limit of his intended provision for the plaintiff; and the difficulty that existed in *Foley v. Parry* was not found in the present case.

The decree, amongst other things, directed a reference to the Master to ascertain the property of the testator at the time of his death, and of the application thereof by the defendant; and what was the surplus after payment of the testator's debts; but his Lordship said, that no direction for maintenance could at present be made, inasmuch as it might possibly be found that there was no surplus estate.

## BROWNE v. BROWNE.

(11 L. J. Ch. 57—59; S. C. 5 Jur. 1053.)

1841.  
Nov. 13.

SHADWELL,  
V.-C.  
[ 57 ]

A testator having left his son 10,000*l.* by his will, expressed an intention verbally of settling 10,000*l.* stock on the son's marriage, and then became insane. The marriage took place, and the 10,000*l.* stock was purchased out of the testator's monies, and settled accordingly. The testator then had a lucid interval, and, on being told of the transaction, did not disapprove thereof. He afterwards became irrecoverably lunatic: Held, first, that the testator confirmed the settlement upon his son by not

(1) 39 B. R. 163 (2 My. & K. 138).

(2) 51 B. R. 250 (10 Sim. 293).

BROWNE  
v.  
BROWNE.

expressing any disapprobation during this lucid interval; and, secondly, that the evidence did not prove that the settlement of the 10,000*l.* was an ademption of the legacy.

By a decree on the hearing of this cause, it was referred to the Master, to take an account of the estate of the testator. The Master reported that the testator, Augustus Browne, by his will, dated the 28th of October, 1829, after appointing his son, P. A. Browne, and Barwell Browne, and another who disclaimed, executors of his will, and after making a disposition of certain stock in favour of his wife for life, and afterwards two-thirds to his son, Philip Augustus Browne, and one-third between his two daughters, Anne Browne and Margaret Williamson, and after stating that he had recently, on the marriage of his daughter Margaret, advanced her, as a marriage portion, the sum of 10,000*l.*, in order to place his son P. A. Browne and his daughter Anne on an equal footing with Margaret, gave to each of them, P. A. Browne and Anne Browne, the sum of 10,000*l.*; and the testator gave the residue of his estate, in equal portions, between his three children. The Master found that the testator died in January, 1836: that in March, 1831, P. A. Browne was desirous of making a proposal of marriage to his present wife, upon which the testator intimated to him that he would make a settlement of 10,000*l.* stock upon his marriage; and that he had no doubt he would make up his income to 1,000*l.* per annum: that upon the application of Colonel St. Clair, a mutual friend of the testator and of Sir Charles Rich, the intended bride's father, the testator stated, that he would immediately settle upon his son the sum of 10,000*l.*, 3*l.* per Cent. stock, and that he would make up the income equal to 1,000*l.* per annum; and that should his son and his intended wife find themselves straitened, he might be inclined to increase the allowance: that the testator frequently expressed to Barwell Browne his intention of settling 10,000*l.* upon his son on his marriage: that in April, 1831, before the settlement could be finally arranged, the testator became of unsound mind, and incapable of managing his affairs; and that he was, under proper medical advice, separated from his family, and placed under the care of Dr. Willis: that Barwell Browne, knowing it had been the intention of the testator to make such settlement of the sum of 10,000*l.* stock, and being aware of what had passed between the testator and Col. St. Clair, and that the same had been communicated to Sir Charles Rich, purchased, with the sum of 8,412*l.* 10*s.*, part of the money belonging to the testator,

BROWNE  
v.  
BROWNE.

the sum of 10,000*l.*, 3*l.* per Cents., which sum was accordingly transferred into the names of Barwell Browne and William Rich, as trustees, under an indenture of settlement, dated the 9th of May, 1831, made upon the marriage of P. A. Browne: that the marriage was solemnized on the 2nd of June, 1831: that in the month of October, 1831, the testator had almost recovered from his unsound state of mind, and was then perfectly capable of understanding and attending to matters of business: that Barwell Browne informed the testator of the arrangement respecting the settlement upon the marriage of his son, and the testator had fully understood the transaction, and did not \*dissent from or express any disapprobation of the aforesaid purchase of 10,000*l.* stock; and that the testator approved of the settlement: that the testator had a relapse towards the end of the year 1831, and in the spring of 1832 was considered irrecoverable: that a commission of lunacy was issued against him on the 3rd of May, 1834, under which he was found of unsound mind from the 1st of January, 1832; and he continued to be of unsound mind till his death: that P. A. Browne had retained out of the testator's estate the sum of 1,587*l.* 10*s.* only, in part satisfaction of the legacy of 10,000*l.*, it being contended, on the part of the legatee (1), that the sum of 8,412*l.* 10*s.*, so advanced for the benefit of P. A. Browne, must be considered as part satisfaction of the 10,000*l.* bequeathed to him by the testator's will, but that P. A. Browne had, by his state of facts, charged, that the said sum of 8,412*l.* 10*s.* was due to him on account of his legacy, and had been improperly divided as part of the testator's residuary estate, to be paid over to the residuary legatees; and that the sum of 5,608*l.* 6*s.* 8*d.*, being two-thirds of the sum of 8,412*l.* 10*s.*, ought to be refunded and paid to the said P. A. Browne, in satisfaction of the legacy; but there being no direction in the decree for him (the Master) to make any inquiry respecting the sum of 8,412*l.* 10*s.*, he had not allowed the defendant's state of facts.

[ \*58 ]

The case now came on upon further directions, and upon the petition of P. A. Browne, praying that it might be declared that the testator approved and confirmed the application of the sum of 8,412*l.* 10*s.* in the purchase and settlement of 10,000*l.* stock upon his marriage; and praying that he might be declared to be entitled to the legacy of 10,000*l.*, in addition to the sum of 8,412*l.* 10*s.*

An affidavit of Colonel St. Clair, which accompanied the petition, confirmed the state of facts contained in the Master's report set

(1) Apparently this should be "residuary legatees."—F. P.

BROWNE  
v.  
BROWNE.

forth in the petition, relating to the conversations which took place between him and the testator as to the marriage of his son, and stated, that the testator frequently, in the presence of him and Mrs. St. Clair, with reference to the distribution of his property, said, that his affairs were by no means settled; that he intended to alter his will very much in favour of his son; that he wished each of his daughters to have 600*l.* a year; and that the rest of his property should go to his son.

The first question argued was, whether the fact of the testator not having dissented from the settlement of the 10,000*l.* stock when he became of sound mind, could be construed into an assent; and, secondly, if the Court should consider the settlement to have been confirmed, whether it was not an ademption of the legacy.

*Mr. Bethell* and *Mr. Piggott*, for the petitioner, upon the question of ademption of the legacy, cited *Debeze v. Mann* (1), *Trimmer v. Bayne* (2).

*Mr. Wakefield* and *Mr. Toller*, for Mrs. Williamson and her daughter.

*Mr. Ellis* for Anne Browne.

*Mr. F. J. Hall* for Barwell Browne.

#### THE VICE-CHANCELLOR :

The first question is, whether there was such an acquiescence by the testator in what was done by Barwell Browne as to make it the act of the testator, Augustus Browne. It is acknowledged, he could not be bound at the time of the marriage, from his state of mind: a difference, however, took place in the autumn of 1831; and it appears, from his nephew's evidence, that his state of mind then was materially changed. He might be capable of attending to matters of business, though not quite recovered; and if so, he might be supposed to approve, because he did not disapprove. I think silence gives consent. All parties allow that he understood the transaction; and I think it must be taken that he confirmed it.

On the second question, I think there is no ground for not giving the fairest effect to this evidence of Col. St. Clair. There is no ground for supposing inaccuracies in his testimony; and I must say, that there is nothing on the face of the will that makes it at all

(1) 1 R. R. 57 (1 Cox, 346).

(2) 6 R. R. 173 (7 Ves. 508).

unlikely to have so happened that the testator would have expressed himself as Col. St. Clair represents him to have done. Upon the face of the will, so far from there being equality, it is manifest to me, that he did intend the most marked inequality between his son and his two \*daughters. By the settlement, the sum of 10,000*l.* stock was held upon these trusts, viz. to his wife for life, two-thirds of it to his son, and the other one-third to be divided between his two daughters. Then, the testator, by his will, directs, that over and besides a sum of 6,000*l.* to which he refers, so much money shall be then invested as, together with the 6,000*l.*, will produce 1,200*l.* per annum: then the testator provides, that the non-advancement of a further sum to Margaret shall not affect the others, to whom he gives 10,000*l.* each, so that there might be an equality of division. Then the testator, in giving the residue, gives it subject to his debts, and the legacies given by his will, or which he might give by a codicil thereto. This distinctly shows that he did not mean a final arrangement of his property—confirming Col. St. Clair's statement that his mind was unsettled, that being the case in March, 1831. The marriage of the son was set on foot; and then, according to the passage about the conversation between the father and son, it is natural that the father would, in the first instance, say, "I have settled 10,000*l.* on Margaret, and I will do the same to you." That was what he thought would be the least he could do; but then, it appears, it was not all he meant to do, which is shown by his referring to plate, wine, &c. In these conversations with Col. St. Clair, the testator repeatedly stated that he intended to make an alteration greatly in favour of his son. Now, these conversations, which were simultaneous with the act said to be done, were evidence to rebut the presumption at law; and the testator, so far from meaning that the advancement should be an ademption, declares his intention to increase the benefits to his son, and not to nullify those given by the will. I think it is a plain case for saying, that the conversations with the testator at the time of the advancement are sufficient to show his intention that his son should have the testamentary benefit at least, and also the other advancement; this is therefore no case of an ademption.

I had occasion lately to look into the books upon civil law, as to this question of ademption, which has always been said to emanate from the civil law, but it is remarkable how very few passages in the civil law relate to the subject.

BROWNE  
*et*  
 BROWNE.

[ \*59 ]



1842.  
Feb. 19.

KNIGHT  
BRUCE, V.-C.  
[ 157 ]

## HORLOCK v. SMITH.

(11 L. J. Ch. 157; S. C. 6 Jur. 478.)

A receiver was appointed by the Court, of an estate which had been mortgaged to A. By a decree, dated in December, 1827, the receiver was ordered to be discharged, and to pay the balance in his hands to A. The receiver continued to receive the rents until 1830, but paid them over to A., and after that time the rents were paid by the tenants to A.: Held, that the possession of the receiver, after December, 1827, was the possession of A.; and that therefore A. had been in possession from that time.

A MORTGAGE was made to Jane Priestly, of an estate for 1,000*l.* In 1821, a receiver was appointed by the Court of this estate, and between 1821 and 1827, no interest was paid to her in respect of the mortgage money. In December, 1827, a decree was made in several causes, affecting this and other property, to one of which J. Priestly was a party, declaring that she was the first incumbrancer on this estate, and directing, among other things, that her principal and interest should be ascertained, and that the receiver should be discharged, pass his accounts, and pay the balance in his hands to her; and that on such payment being made, his recognizances should be discharged.

It appeared by the report of the Master, made in pursuance of this decree, that the receiver had paid the balance accordingly, but that he had continued to receive the rents until Lady Day, 1830, which he paid to J. Priestly; and that after that time the rents had been paid by the tenants to her. Upon the causes coming on for further directions in 1837, before the Lord Chancellor, on the suggestion that the accounts ought to be taken with annual rests against Jane Priestly, on the ground that there was no arrear of interest at the time she entered into possession of the estate, the Master was directed to inquire when Jane Priestly entered into possession of the estate. The Master, in pursuance of this direction, found that she had entered into possession in December, 1827.

An exception was taken to the report on this point.

*Mr. Cooper* and *Mr. Keene*, for the exception, argued, first, that as the facts stated in the report were before the Lord Chancellor, it must be presumed, that his Lordship had concluded the question, and decided that such holding of the receiver was not the possession of the mortgagee; and, secondly, independently of such authority, the possession of the receiver could not be

considered as that of the mortgagee. They cited *Thomas v. Brigstocke* (1). HORLOCK  
v.  
SMITH.

*Mr. Spence* and *Mr. Calvert*, for the report, were not called on.

KNIGHT BRUCE, V.-C.:

The common meaning of the expression, and the meaning in this decree, of a person being in possession, is, when rents are paid to him, or by his order, or for his use. *Jane Priestly* has received the rents from December, 1827, and, therefore, has been in possession from that time.

### FEWSTER v. TURNER.

(11 L. J. Ch. 161—164; S. C. 6 Jur. 144.)

1842.  
Dec. 14, 15,  
18.

WIGRAM,  
V.-C.  
[ 161 ]

An estate was put up to sale in lots. In the particulars the lots were described respectively as "All that, &c. comprising Lot — in the sale plan." The sale plan, circulated at the auction, represented a well on Lot 4, with a drain and pipe conveying the water from the well through Lot 2 to Lot 1. The plaintiff, the purchaser of Lot 1, filed his bill for specific performance, with compensation for the loss of the water, the vendor having conveyed away the other two lots, without any reservation to the plaintiff of a right to the flow of water from the well: Held, that the sale plan, accurately describing the existing state of the property, would not carry the case higher than a view of the property by the purchaser. Decree for specific performance, without compensation.

The claim for compensation being the sole cause of the suit, costs were given against the plaintiff.

On the 7th of September, 1837, certain adjoining lands and messuages belonging to the defendant, were put up to sale by public auction in several lots. The lot in question was described in the particulars as "All that capital public-house, called the 'Acorn Inn,' &c. with the field adjoining, comprising Lot 1 upon the sale plan." In the conditions of sale there was the usual clause as to compensation. The plaintiff attended at the sale, became the purchaser of Lot 1, paid the deposit, and signed the memorandum of agreement.

The purchaser of Lot 1 filed his bill, alleging, that at the time of the auction the defendant caused to be circulated, with the particulars of sale, a ground plan of the estate, which was to be sold in lots; that in Lot 4, as represented on the plan, was a well, and in Lot 2 a reservoir, and a line drawn from the well to the reservoir represented a stone drain, which conveyed the water from

FEWSTER  
r.  
TURNER.

the well to the reservoir, and another line drawn from the reservoir to the "Acorn Inn," representing a leaden pipe which conveyed the water from the reservoir to the kitchen of the inn; that in November, 1837, the plaintiff obtained an abstract of the title, and in May, 1838, caused a draft conveyance to be prepared, and sent to the vendor's solicitor, with a letter to the effect, that it was to be without prejudice to the plaintiff's title; that shortly afterwards the plaintiff discovered, that the vendor was about to convey Lot 4 to another purchaser, without any reservation of the right of water to the plaintiff from the well, as described in the plan under which the plaintiff purchased; that notwithstanding the plaintiff's remonstrances, the vendor did shortly afterwards convey away Lot 4 without any such reservation; that pending these discussions, the vendor contracted to sell the same Lot 1 to the Hemingways, who were made defendants to the bill. The bill prayed for specific performance, with compensation for the loss of the water. The answer of the defendant, the vendor, admitted the sale, and that some plan with such lines upon it was distributed at the time of the sale, and that such sale plan was a map or plan of the lands, with their rights, members, and appurtenances; that in the conveyances of the other lots, he did not mean to reserve any right of water to the plaintiff; that he was always ready to convey the premises according to the contract; and that he refused to comply with the plaintiff's demand under the circumstances mentioned. He also admitted the subsequent contract with the Hemingways. No evidence was entered into on the part of the plaintiff.

*Mr. S. Sharpe* and *Mr. B. Parry*, for the plaintiff, contended, that the facts disclosed in the bill and answer, entitled the plaintiff to the decree prayed.

*Mr. Wakefield* for the defendant, the vendor :

The particulars contain nothing with respect to the supply of water. The plan was merely referred to as showing the extent of Lot 1, and the existing state of the premises.

(WIGRAM, V.-C. : If your client had remained owner of the other lots, would a court of equity have allowed you to stop the supply of water ?)

[ \*162 ] Suppose a sale of some of the great breweries \*in London, whose premises are often separated by a street, and yet are connected with

pipes to supply water from one side to the other; could the purchaser of one lot prevent the communication being cut off? There must be something in the agreement to that effect. It is not alleged, that the draft conveyance contained any covenant to this effect. It is not shown, that it is essential to the house. In *Dyer v. Hargrave* (1), it is doubted, whether the Court ought to compel compensation for that which hardly admits of pecuniary value.

FEWSTER  
v.  
TURNER.

*Mr. Steere*, for the Hemingways. \* \* \*

*Mr. S. Sharpe*, in reply:

\* \* By the reference, the plan was incorporated into, and became part of the particulars. The fact of the existence of the water, might have been known from inspection, but the answer of the defendant shows, that the sale plan was a map of "the rights, members, and appurtenances." As the defendant has put it out of his power to fulfil his contract, the plaintiff has a right to compensation. The value of it as an easement is shown by the fact of its being specified in the plan. As to the lapse of time, it was not necessary for the plaintiff to file a bill, till the purchaser had conveyed away the other lots without any reservation; it then became a subject of money compensation, as a diminution of the thing sold.

WIGRAM, V.-C.:

The question is, whether there was an implied contract to assure the plaintiff the water. If it is appurtenant to the house, the other purchasers cannot disturb the right. It seems to me nothing more than an agreement to sell the land as it then stood; and at the same time an intention was expressed to convey the adjoining property to other persons. It is similar in many respects to the case of *Squire v. Campbell* (2), where Lord COTTENHAM decided there was no contract.

WIGRAM, V.-C.:

Certain property belonging to the vendor was put up to sale by public auction, in several lots. The plaintiff attended the sale, and became the purchaser of Lot 1. He was satisfied with the title, and prepared a draft conveyance on that footing. The question is, whether the contract is to be performed *simpliciter* by a conveyance

(1) 8 R. R. 36 (10 Ves. 508).

(2) 43 R. R. 231 (1 My. & Cr. 459).

FEWSTER  
v.  
TURNER.

from the vendor, or whether the purchaser is entitled to compensation in respect of that part of the property, which I shall now mention. There were the usual particulars and conditions of sale, in which the lot purchased was described as "Lot 1 in the sale plan." That plan was not produced in evidence; but a passage was read from the answer, which, taken in connection with the bill, made it sufficiently evident what it was. That sale plan had this upon it. Upon one of the lots, not purchased by the plaintiff, was a well; upon another, was a reservoir; then upon the sale plan, a line was drawn connecting the well with the reservoir, and another line connecting the reservoir with the "Acorn Inn." It is admitted, that the first-mentioned line denoted a stone drain, by which the water was conveyed to the reservoir; and that the other line represented a pipe running from the reservoir to the kitchen of the inn. Since this took place, the vendor has conveyed the other lots to the respective purchasers, \*and, in their conveyances, had not taken any means to secure to the plaintiff the flow of water. Under these circumstances, the plaintiff says, that the effect of the sale plan was to represent to him, that the water supplied by the stone drain and pipe to the inn, was part of his lot; and that the vendor, having conveyed away the other property, without any reservation, has damnified him by the loss of the use of the water, and that therefore he is entitled to compensation. If, in this case, it was material to advert to the sale plan, I should require more information than I now have. There is no evidence that the plaintiff ever saw the sale plan. There is direct evidence that the plaintiff, shortly after his purchase, had an abstract of title, and prepared a draft conveyance, on the footing of his being satisfied with the title. That draft is not produced in evidence, so that I have no means of knowing, whether upon the draft, he claimed any such reservation as that upon which he now insists; though I do not mean to say that any omission on his part to specify that, would vary the contract. But in a case where, to say the least of it, the terms of the contract are extremely equivocal, if the plaintiff has gone on from September, 1837, to March, 1838, without making any such claim as he now makes by his bill, and has allowed the vendor to convey the rest of the property to other persons, with an indirect intimation on his part that he did not mean to claim any such reservation, the Court will leave him to his other remedies, independently of his right to compensation. For nothing would be more unjust, after the vendor has put it out of his power, by

[ \*163 ]

FEWSTER  
v.  
TURNER.

conveyances, to grant it himself, to allow a purchaser to make this claim ; which, if the contract included it, would be binding on the other purchasers equally with the vendor. The Court would not, after that, give the plaintiff the relief asked in respect of compensation. But I am not called upon to decide that point, because, in my view of the case, there is no such contract as that set up. I observe, first, that the sale plan does not, in the slightest degree, vary the contract. Where the sale plan is different from the actual state of the property, it is extremely material to consider, whether the purchaser was misled by the fact ; but, where the sale plan accurately represents the property, which in this case it does, can the sale plan carry the case further than a view of the property itself would ? I am only, therefore, called upon to assume, that which the plaintiff has clearly a right to have assumed, that the property was advertised to be sold to him as it stood at the time. The question is then, assuming that the plaintiff went to the property and viewed it, and saw the pipe, &c., would he in that case be entitled to the reservation he claims ? The state of the case is this : a person has property, consisting, partly of the " Acorn Inn," and partly of other property ; he has a pipe leading from one part of the property to the inn, for the use of the kitchen ; he advertises the property for sale in lots, which is a direct intimation to the purchaser, that if he does not purchase the other lots, they will go into the hands of other persons, liable to be dealt with by them, as any person may deal with property in which he has acquired an absolute ownership. All the vendor undertook was to sell the property ; but with notice, that the rest of the property would no longer remain in his hands. Suppose this altogether a natural flow of water. A person then agrees to sell property, and sells it with the running water there ; but makes no stipulation that he will enter into a covenant, that the other purchasers shall not disturb the natural flow of the water ; the plaintiff purchasing the property with such natural flow of water, is left to assert his right against the other purchasers, if the flow of water is an easement to the property. How does the case differ if it is an artificial stream ? The vendor says, " I sell you the property as it is. Other persons will hold one part, and you the other ; " the plaintiff must be left to assert his right against the other purchasers. It is not for the vendor himself to take any other precaution than that of conveying to the purchaser that which he contracts to sell. I have less hesitation in coming to this conclusion, because, if the effect of the

FEWSTER  
v.  
TURNER.

[ \*164 ]

contract really is to give the plaintiff the right he claims, the other purchasers who have purchased on the footing of the sale plan, will have purchased with notice of the plaintiff's contract, and are as much liable to the purchaser as the vendor himself, if he had remained owner of the other lots; for, in point of fact, they all purchased upon the same footing, and \*with full notice of the stipulations. The plaintiff cannot be damnified by my decision; but the vendor would be seriously damnified by being called upon, after he has conveyed away the property to persons, subject to this equity, to make compensation. If my opinion were less decided than it is, I could not give the relief in the form in which the case now stands, because there is not a particle of evidence to show that the well gives a supply of water naturally without manual labour; it might then assimilate itself to the case of a natural stream. But most likely a pump and manual labour are necessary; and then nothing could be more extravagant than to suppose that when the vendor sold the property, he intended the other purchasers, by manual labour, to supply the inn with water from the well, or that the purchaser of this lot should have power to enter the other property and pump for himself. I am not at all informed, whether the plaintiff would derive any essential benefit from it. A supply of water is indeed most essential to an inn; but there is no evidence to show that the house is not already abundantly supplied with water. In a question of compensation, and after a conveyance of the rest of the property, the damage sustained by the plaintiff is a material consideration. All these facts might have been brought before the Court if the plaintiff had had a substantial case. The utmost I could have done, under the most favourable view of the case, would have been to refer it to the Master to inquire whether the property had sustained material damage. But parties, who bring a case before the Court in this way, are not entitled to any indulgence. Upon these grounds, and also because I shall not do the plaintiff any injury, I shall refuse that part of the prayer of the bill. The prayer for specific performance is not opposed. The only other question is as to costs. The Hemingways were made defendants to this bill. With full notice of a subsisting contract between Fewster and Turner, the Hemingways enter into a contract with Turner to purchase this same property, and they do not suggest in their answer, that at the time of their contract they really believed the plaintiff had abandoned his contract. If the plaintiff had filed his bill against Turner alone, he would have been

## THE LORD CHANCELLOR:

I cannot see any ground for doubt in this case; the testator was possessed of certain estates in the county of Armagh; these estates he gives to his wife for her life, and he directs, that they shall be answerable for all his just debts; and then he proceeds in these words, "having for some time past the pleasure of contributing 50*l.* per annum, towards the pecuniary means of our dearest niece, Mary Walsh, it \*is needless to request my dearest wife will continue to act in the same manner by her, should my said wife survive me." Had the will stopped there, it is quite clear, that the bequest would have been but of an annuity of 50*l.*, during the life of his wife; an annuity of 50*l.*, to endure so long as her estate would enable her to pay the annuity; but, "in order to give certainty to his intention," the testator goes on to charge "all his estates in the county Armagh, with an annuity of 50*l.* per annum, payable half-yearly to our said dear niece, Mary Walsh, from the day of my death." He wished to pay his wife a compliment, but at the same time he intended to make the payment of the annuity certain. But as his niece might survive his wife, he goes on to provide for that event, and he charges the lands, "with a further annuity of 50*l.* per annum, to commence from the day of the death of my said dearest wife." Now, I would ask, was not this necessary? The first charge did not extend beyond the life of the wife; this latter clause was therefore introduced, not alone from caution, but from necessity.

But it is said, why do all this? why could not the testator, in so many words have said, that his niece was to have an annuity of 50*l.* charged on his Armagh estates? of course he could; but he has not thought proper to frame his will in that way; and, indeed, it appears to have been necessary for him to adopt the course he has done, from the way in which he chose to frame his will, and the manner in which the property was settled. His wife was but tenant for life of the Armagh estates; he meant to pay her a compliment, as I have already observed; but he then spoiled it, by adding the clause which follows, "but in order to give certainty," &c. &c. Whether the words in the first part of the bequest would be sufficient to create a trust, which this Court would \*enforce, I need not inquire, the testator having in the next sentence actually charged the Armagh estate with the payment of this annuity.

It is argued, that either of the gifts would have been sufficient to give this lady an annuity for her life. This I deny; for the first

BAYLEE  
v.  
QUIN.  
*Jan. 22.*

[ \*118 ]

[ \*119 ]



PETTINGALL harness; and that my executor consider himself in honour bound  
 PETTINGALL<sup>c.</sup> to fulfil my wish, and see that she be well provided for, and remove-  
 able at his will. At her death all payment to cease."

It being admitted that a bequest in favour of an animal was valid, two questions were made: first, as to the form of the decree on this point; and secondly, as to the disposition of the surplus not required for the mare.

KNIGHT BRUCE, V.-C. said, that so much of the 50*l.* as would be required to keep the mare comfortably, should be applied by the executor, and that he was entitled to the surplus. He must give full information, whenever required, respecting the mare; and if the mare were not properly attended to, any of the parties interested in the residue might apply to the Court. The decree on this point ought to be, that 50*l.* a year should be paid to the executor during the life of the mare, or until further order; he undertaking to maintain her comfortably; with liberty for all parties to apply.

*Mr. Wigram and Mr. Romilly, for the executor.*

*Mr. Swanston, Mr. Keene, Mr. Simpkinson, Mr. Shadwell, Mr. Russell, Mr. Havens, Mr. Parker, and Mr. Heathfield, for other parties.*

1842.  
 Feb. 19, 21.

WIGRAM,  
 V.-C.  
 [ 255 ]

## SUTTON v. TORRE.

(11 L. J. Ch. 255—256; S. C. 6 Jur. 234.)

Bequest by a testator to his daughter H. B. M. S., and her younger children: Held, that the daughter and her younger children took absolute interests as joint tenants of the fund.

LORD SCARBOROUGH made a codicil to his will, dated 11th of October, 1834, as follows: "Head of instructions to my solicitor J. Lee, to add to my will the codicil following: In addition, &c. I leave to my dear wife Lady S., 80,000*l.*, or interest thereon, at 5*l.* per cent. out of my different investments; and, at her decease, 50,000*l.* of that sum to go to my daughter Lady F. C. and children, for their sole use and benefit, &c. To my daughters A. M. S. and L. F. S., each 20,000*l.* = 40,000*l.* Ditto, Dr. H. B. M. S., &c. 10,000*l.*: the residue of my property to be divided into three equal parts, viz.: To my daughter L. F. C. and children, for their sole use and benefit, one part; daughter H. B. M. S. and her younger children, one part; and one part between my brother T. H. L. and Sir W. L.,

or their joint lives; then, after their decease, to be divided between the first and second parts, viz.: my daughter L. F. C., &c. and my daughter H. B. M. S. and her younger children. The same executors and trustees, &c. This is my last will and testament. SCARBOROUGH."

SUTTON  
v.  
TORRE

The initials H. B. M. S. were admitted to mean Lady H. B. Manners Sutton, and L. F. C. Lady Louisa Cator; and the question in the cause was, whether, upon the construction of the words of the residuary clause, Lady H. B. Manners Sutton took a life interest in the residue, with remainder to her younger children, or whether she and her children took equally as joint tenants.

It was mentioned that in the case of the bequest to Lady L. Cator, the VICE-CHANCELLOR OF ENGLAND had held, that the mother took an estate for life, with remainder to her children.

*Mr. Sutton Sharpe* and *Mr. Lloyd*, for the plaintiffs, the younger children of Lady H. B. M. Sutton. \* \* \*

*Mr. Cockerell*, for Lady H. B. Manners Sutton.

[ 256 ]

*Mr. Girdlestone* and *Mr. Godbé*, for two of the trustees of the marriage settlement.

*Mr. Boteler*, for the two other trustees.

*Mr. Temple* and *Mr. Roupell*, for the trustees of the settlement of Lady H. B. Manners Sutton's second marriage.

*Mr. Tennant*, for the legal personal representatives of the Earl of Scarborough.

*Mr. Sutton Sharpe*, in reply.

WIGRAM, V.-C.:

Feb. 21.

I find it has been assumed in this case to be clear, that the initials H. B. M. S. refer to Lady H. B. Manners Sutton. This then is a bequest by the testator of a residue to his daughter and her younger children. In the case of a bequest of personalty to A. B. and C., they would no doubt take as joint tenants. In the case of a gift to a class of persons, as children or grandchildren, they would take as joint tenants. And if, instead of being a bequest to a class, a stranger be added, they would still take as joint tenants. The question is, whether, if one of the class be in a

SUTTON  
v.  
TORRE.

different degree, *ex. gr.*, a mother, the case is the same. I am of opinion, that upon principle the case is the same; and the cases seem to warrant the conclusion, that it should be so. But, it is said, that the VICE-CHANCELLOR OF ENGLAND has put a different construction upon another part of the will. I have mentioned the case to his Honour, who, so far from having any doubt on the point, mentioned, that he had lately decided a case in which he had confirmed the doctrine of joint-tenancy to the fullest extent. The question is, whether there is anything in this case to vary the construction. In the case of Lady L. Cator, the bequest to her in the will was to her for life, with remainder to the children. In the codicil, it is "to my daughter Lady F. C. and children, for their sole use and benefit;" in the subsequent bequest, it is to "my daughter L. F. C., &c."—whereas in the case of Lady H. B. M. Sutton, it is given to her, not for her sole use, or to her and all her children, but to "her and her younger children," without any "&c." to denote any uncertainty or reference to what had gone before. I have not before me the circumstances which were held to take Lady L. Cator's case out of the rule as to joint-tenancy; and, therefore, I am not at all impeaching the correctness of the VICE-CHANCELLOR OF ENGLAND's judgment, when I say, that in this case I find nothing to justify me in departing from the usual construction. I must therefore declare, that under the codicil, the mother and her younger children are entitled, as joint tenants, to the fund in question.



1842  
May 30.

KNIGHT  
BRUCE, V.-C.  
[ 372 ]

### BARKER v. RAILTON (1).

(11 L. J. Ch. 372—373; S. C. 6 Jur. 549.)

*Semble.* An executor may prove the will of his testator, and at the same time renounce the probate of the will of a testator, of which will his testator had been the sole executor.

THIS was a suit instituted for the administration of the personal estate of Thomas Foster, by a person interested under his will. The bill stated, that Thomas Foster made his will, and thereby appointed Stephen Railton his executor, who duly proved the same; and that Stephen Railton made his will, and thereby appointed the defendants, Ruth Railton and Joseph Bayley, his executrix and executor, who duly proved the same, and thereby

(1) This expression of opinion is not in accordance with the general practice of the old Court of Probate.—O. A. S.

became the personal representatives both of Stephen Railton and Thomas Foster.

BARKER  
v.  
RAILTON.

Ruth Railton and Joseph Bayley by their answer stated, that they had not acted in the administration of the trusts of the will of Thomas Foster, and that they had renounced probate of his will, and submitted whether the representatives of Foster ought not to be made parties.

*Mr. Purvis*, for the plaintiff.

*Mr. Kenyon Parker* and *Mr. Jeremy*, for Ruth Railton and Joseph Bayley, [cited *Hayton v. Wolfe* (1); *Wankford v. Wankford* (2)].

(KNIGHT BRUCE, V.-C., said, it had been always his impression that an executor might take probate of the will of a testator, and at the same time disclaim the probate of the will of a testator, of which will his testator had been the executor. He then required the probate of the will.)

## CHANCERY COURT IN IRELAND.

### ROCHFORD v. FITZMAURICE.

(2 Dr. & War. 1—31; S. C. 1 Con. & L. 158.)

1842.  
Jan. 12, 17.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 1 ]

By post-nuptial articles, J. F., having then living two sons, H. and T., and one daughter, M., covenanted with trustees to settle certain lands, of which he was seised in fee, as counsel should direct, to the use of J. F. for life, remainder to trustees to preserve, &c., remainder to the use of H., and to permit him to take the rents and profits for his life, remainder to the heirs male of the body of H., remainder to the use of T., and to permit him to take the rents and profits for his life, remainder to the issue male of T., with remainders to the unborn sons of J. F. in tail male, in strict settlement, with remainders over: Held, that H. took an estate for life only.

There is no difference between executory trusts, created by a post-nuptial or voluntary settlement, or by a will; in each case the question whether a particular trust is executory must be collected from the nature of the dispositions in the instrument.

By post-nuptial articles of agreement, dated the 26th of April, 1760, made between James Fitzmaurice of the first part, Katherine his wife, of the second part, and S. Moore and R. Rose, trustees on the part of Katherine, of the third part; reciting, that Harman Fitzmaurice (the father of the said James), being seised of certain

(1) Cro. Jac. 614.

(2) 1 Salk. 308.

ROCHFORD  
F.  
FITZ-  
MAURICE.

[ \*2 ]

lands in possession, and being also entitled to certain other lands, expectant upon the death of his father James Fitzmaurice (the elder), "by deed bearing date the 18th of December, 1732, and made on the intermarriage of the said Harman with Margaret Fitzgerald, daughter of Gamaliel Fitzgerald, and Susanna his \*wife, the said Harman Fitzmaurice did settle and convey to certain trustees, the said several lands, in trust for said Harman, during the term of his natural life, remainder to the said trustees, in trust for his, the said Harman's, first and eldest son, to be by him begotten on the body of the said Margaret, with several remainders over, as in and by the said deed may appear, subject to a provision therein mentioned, for his, the said Harman's, younger children; by which deed the said Gamaliel, on his part, did thereby convey to certain trustees," certain other lands, "in trust for the said Gamaliel, during the term of his life, remainder to the said trustees, in trust, to permit and suffer the said Harman Fitzmaurice, and Margaret his intended wife, and the survivor of them to take and receive the rents, issues and profits of the said mentioned lands, for and during their respective lives, subject to an annuity of 60*l.* sterling, payable quarterly to the said Susanna; and from and after the decease of the said Harman and Margaret, to the said trustees, in trust, to the use and behoof of the first and every other son of the said Harman, to be begotten on the body of the said Margaret, severally and successively, and in remainder one after another, as they and every of them shall be in seniority of age, and priority of birth, with several remainders over;" and reciting that the said James Fitzmaurice, the elder, and his wife, and the said Gamaliel, and his wife, had died, and that the said Harman, thereupon, became seised of all the lands; and reciting that the said Harman was also dead, having left Margaret his widow (and who had afterwards intermarried with a Mr. Jenkins), and also the said James Fitzmaurice, his eldest son, and five daughters, issue of the said marriage, him surviving; and reciting that the said James Fitzmaurice had intermarried with Katherine Moore, by whom he had issue two sons, Harman and Thomas, and one daughter, \*Margaret; and reciting, that in pursuance of ante-nuptial articles to that effect, the said James Fitzmaurice, by deed bearing date the 7th of July, 1750, had conveyed, or agreed to convey to trustees, all the said lands, for a term of ninety-nine years, for the purpose of securing an annuity of 300*l.* a year to the said Katherine; and reciting that the said James Fitzmaurice had

[ \*3 ]

ROCHFORD  
 v.  
 FITZ-  
 MAURICE.

then lately sold, or agreed to sell, to a Mr. Bateman, a part of the said lands, whereby the security for Katherine's jointure was diminished; and further reciting that the "said James Fitzmaurice is willing and desirous to carry the said two former articles into execution, not only to make a provision or jointure for the said Katherine his wife, if she shall happen to outlive him, but to make a provision for her the said Katherine, in case that the said James and Katherine shall happen to live separately or asunder, during such separation; and also to make a provision for his children by the said Katherine, and for settling and assuring the lands, tenements and hereditaments aforesaid, to and upon the several uses, intents and purposes hereinafter mentioned:" it was witnessed, that in consideration of the said marriage, &c.; and of the marriage portion of the said Katherine, by him received; and also in consideration of the said Katherine joining to levy a fine of that part of the said lands, which had been agreed to be sold to Mr. Bateman, &c., the said James Fitzmaurice covenanted and agreed with the said S. Moore, and R. Rose, &c., that he would, when requested, by such "assurances in the law, as the counsel of the said S. Moore, and R. Rose, or the survivor of them, should advise and direct, settle, convey and assure" the said lands (except those parts previously disposed of to Mr. Bateman), and subject to the life estate of Mrs. Jenkins (the widow of Harman, the elder), in some of the lands, to the said trustees, &c., to the uses, and \*upon the trusts thereafter mentioned concerning the same, "or as near as might be, so far as deaths of parties, and other contingencies would admit;" that is to say (subject to an annuity of 300*l.* a year, provided for Katherine Fitzmaurice, in the event of a separation), to "permit, and suffer the said James Fitzmaurice to take and receive the rents, issues and profits" thereof, "for and during the term of his natural life, without impeachment of waste, and with full power and liberty to commit waste, and from and after the determination of that estate, to the use and behoof of the said S. Moore, and R. Rose, and the survivor of them, and the heirs of such survivor, upon trust only for preserving the contingent uses and estates hereinafter limited, from being barred and destroyed, and for that purpose to make entries, if it shall be needful; and from and after the decease of the said James Fitzmaurice, in case the said Katherine shall survive him, then to the use, intent, and purpose, that said Katherine shall yearly, and every year during the term of her natural life, out of the lands agreed to be settled, have,

[ \*4 ]

ROCHFORD  
v.  
FITZ-  
MAURICE.

receive and take to and for her own use and benefit, one annuity or yearly rent-charge or sum of 300*l.* yearly, payable, &c., and with proper remedies for the same, by distress, entry, and security by terms of years, to trustees, to be for that purpose named by said Katherine; and from and after the decease of the said James Fitzmaurice, then, as, to, for, and concerning, all the lands, &c., so to be settled as aforesaid, charged, &c. as aforesaid, and with the powers and sums hereinafter mentioned, to the uses, and upon the trusts following, that is to say, to the use and behoof of said Harman Fitzmaurice, the said eldest son of the said James Fitzmaurice, and to permit and suffer said Harman and his assigns, during the natural life of the said Harman, to take the rents, issues, and profits of said premises, to his \*and their own use, and from and after the decease of the said Harman, to the use and behoof of the heirs male of the body of the said Harman, lawfully to be begotten; and for default of such issue, to the use and behoof of Thomas Fitzmaurice, the second son of the said James Fitzmaurice, during his natural life, and to permit and suffer the said Thomas Fitzmaurice and his assigns, to receive and take the rents, issues, and profits of said premises (save only the jointure aforesaid), during the natural life of the said Thomas Fitzmaurice, and from and after his decease to the issue male of the body of the said Thomas Fitzmaurice, lawfully to be begotten; and for want of such issue, then to the use and behoof of the third, fourth, fifth, sixth, and all other, the sons of the said James Fitzmaurice, on the body of the said Katherine to be begotten" in strict settlement, "and for default of such issue, to the use and behoof of the said Margaret, and such other daughter or daughters, as the said James Fitzmaurice shall or may have or beget on the body of the said Katherine, his wife, if any, share and share alike, and if no other daughter save the said Margaret, then the said premises to go and descend to the said Margaret, her heirs and assigns for ever; but in case the said Margaret shall or may die before her intermarriage, and that the said James shall have no other daughter by the said Katherine, who shall or may live to be married, the said premises to go and descend to the said James, his heirs and assigns for ever."

The deed then contained the following powers: first, powers were given to James Fitzmaurice, to raise, by sale or mortgage of a competent portion of the lands agreed to be settled, 2,000*l.* for the discharge of incumbrances affecting the said premises, and to charge the said lands with a \*jointure not exceeding 100*l.* a year

[ \*5 ]

[ \*6 ]

for any after-taken wife. Then followed a power to the trustees to raise 3,000*l.* as portions for younger children of the said James and Katherine. Then came a general power given to James, Harman, Thomas, and the issue male of James by Katherine, when seised of the premises under the preceding limitations, to make leases not exceeding three lives or thirty-one years, without fine, &c. And this was followed lastly, by a power of jointuring given to Harman Fitzmaurice, and such other of said issue male, as should, under the limitations aforesaid, be seised of, or entitled to, the said premises. The attestation clause indorsed on this deed contained an agreement on the part of Katherine Fitzmaurice, in the event of Margaret Jenkins happening to survive James Fitzmaurice, that she would, during the life of the said Margaret, relinquish 100*l.* per annum of her jointure. This instrument was duly registered.

ROCHFORD  
v.  
FITZ-  
MAURICE

At the time of the execution of this deed, James Fitzmaurice, the settlor, was seised in fee simple of the said lands, having in the year 1757 suffered a recovery, and barred the estate tail, to which he was entitled under the provisions of the deed of the 18th of December, 1732, the limitations of which were very imperfectly recited in the last mentioned deed.

Upon the death of the said James, his eldest son, Harman Fitzmaurice, entered into possession of the premises, and in the years 1807, 1823, and 1833, executed to John S. Rochfort (the plaintiff in this suit) bonds (with warrants of attorney for confessing judgments thereon annexed,) conditioned respectively for the payment of the sums of 277*l.* 10*s.*, 275*l.* 2*s.* 6*d.*, and 220*l.* And three several \*judgments were accordingly duly obtained by the plaintiff in the Court of Exchequer.

[ \*7 ]

In Michaelmas Term, 1809, the said Harman Fitzmaurice, conceiving that under the articles of 1760, above mentioned, he was tenant in tail of the lands comprised in that instrument, suffered a recovery of all the said lands.

The said Harman Fitzmaurice died in the month of July, 1839, intestate, and leaving James Fitzmaurice the younger (one of the defendants), his eldest son and heir-at-law him surviving, and also leaving the said several judgments obtained by the plaintiff unsatisfied.

On the 18th of November, 1839, the present bill was filed by Mr. Rochfort, the conuzee of the said judgments, against James Fitzmaurice the younger, the personal representative of Harman, the conuzor, and other parties, for the purpose of raising the



ROCHFORD  
v.  
FITZ-  
MAURICE

amount of principal and interest due upon foot of the judgments, stating the facts above mentioned, and praying the usual accounts, and that if the personal estate of the said Harman Fitzmaurice was insufficient for the purpose, the said amount might be raised out of his real estates, which had descended on the defendant James. To this bill the defendants filed their answers, alleging that there was no personal estate, and insisting that Harman was only tenant for life of the lands comprised in the deed of 1760, and that those lands consequently were not liable to the judgments. On the cause coming on to be heard, it was admitted that there were no personal assets of Harman, the conuzor, and the only question argued at the Bar was shortly this, whether upon the construction of the articles of 1760, Harman Fitzmaurice, \*the eldest son of the settlor, was tenant in tail, or tenant for life only, of the lands comprised in that instrument?

[ \*8 ]

*Mr. Serjt. Warren, Mr. Smith, and Mr. Griffith, for the plaintiff, [relied on the rule in Shelley's case, and cited Blackburn v. Stables (1), Highway v. Banner (2), and Brudenell v. Elwes (3)].*

[ 11 ]

*Mr. Moore, Mr. Brooke, and Mr. Burroughs for the defendant, James Fitzmaurice :*

[ 12 ]

\* \* The power to jointure indicates an estate for life, so does the power of leasing, for it is more restricted than that which the statute (4) confers on a tenant in tail; and if the omission of a power to charge \*was improvident, the defect is no reason why the Court should reject a construction in other respects provident and only reasonable. Compare the clauses by which the estates are respectively limited to James and Harman, they are perfectly similar, distinguishable only in the power to commit waste, and in the limitation to preserve contingent remainders, which would be extended to Harman's estate, if a formal settlement were executed. Now James is confessedly tenant for life only. [They cited *Leonard v. Earl of Sussex* (5), *Taggart v. Taggart* (6), and other cases referred to in the following judgment.]

[ \*13 ]

*Mr. Griffith, in reply, [cited Legatt v. Sewell (7), Bale v. Coleman (8), Franks v. Price (9)].*

(1) 13 R. R. 120 (2 V. & B. 559).

(2) 1 Br. C. C. 584.

(3) 6 R. R. 310 (7 Ves. 381).

(4) 10 Car. I. sess. 3, c. 6.

(5) 2 Vern. 526.

(6) 9 R. R. 19 (1 Sch. & Lef. 84).

(7) 1 P. Wms. 87.

(8) 1 P. Wms. 142.

(9) 52 R. R. 97 (3 Beav. 182).

## THE LORD CHANCELLOR :

I desired this case should stand over for judgment, not from any doubt, which I entertained upon the rule of law, but in consequence of its having been stated on the one side, and partly admitted upon the other, that according \*to what had fallen from a learned Judge in one of the cases cited, that, which I supposed to be an established rule of law, was still unsettled, and that in point of fact, some of the earlier authorities had been overruled. I have, therefore, taken the opportunity of examining every one of the cases upon the subject, for, I confess, I was not a little surprised by the statement at the Bar.

This case arises upon the construction of a settlement made after marriage. James Fitzmaurice was tenant in tail of the lands in question, subject, as to part of the lands, to an estate for life, and by a settlement, executed previously to his marriage, he had charged all the lands with an annuity of 300*l.* per annum, for his wife, by way of jointure. Sometime after the marriage, Mr. Fitzmaurice suffered a recovery, and having occasion to raise money, sold a part of the estate which was subject to the said annuities, to a Mr. Bateman, and induced his wife to join with him in giving effect to the conveyance, by levying a fine, in order to bar her rights as against that part of the lands. Under these circumstances, the settlement now before the Court was executed. The deed recites its objects, which were not only to secure the annuity to the wife, and to make a provision for her in the event of a future separation from her husband, but also to provide for the children of the marriage, “and for settling and assuring the lands, tenements, and hereditaments aforesaid, to and upon the uses, intents, and purposes hereinafter mentioned.” Mr. Fitzmaurice (the settlor), covenants to convey the lands to certain trustees, “by such assurances in the law as the counsel of the said trustees shall direct, to the uses thereafter mentioned,” and those uses are (subject to the prior life estate in some of the lands, and to certain provisions for his wife, in the event of a separation and by way of jointure), \*to permit Mr. Fitzmaurice to receive the rents and profits for his life, without impeachment of waste, and, in fact, with an express power to commit waste; then follows a limitation to the trustees to preserve contingent remainders, which is not confined to the life of the settlor, with remainder to Harman Fitzmaurice, the eldest son of the settlor (he had two sons and one daughter living at the time) for his life, and then, without the

ROCHFORD

vs.  
FITZ-  
MAURICE.  
Jan. 17.

[ \*14 ]

[ \*15 ]

ROCHFORD  
v.  
FITZ-  
MAURICE.

intervention of trustees to preserve, follows a limitation "to the heirs male of the body" of the said Harman, remainder to Thomas (the second son), for life, remainder "to his issue male;" (neither in the case of Harman nor of Thomas do we find the clause without impeachment of waste), with remainders to all the other sons of the marriage, and the heirs male of their bodies. Then come the limitations to the daughters, in words, which according to their grammatical construction, would merely give them estates for life, unless there was only one daughter, but the cases of *Owen v. Smyth* (1), and *Doe v. Martin* (2), have decided, that in construing such limitations, by punctuation, or by the use of a parenthesis, the words "heirs and assigns," may be extended in their application, and instead of being confined to one daughter, may be referred to all the daughters of the marriage, if more than one. There is then a shifting use over to the settlor, in the event of all his daughters dying unmarried. The deed then contains certain powers, viz., a power to the settlor to raise 2,000*l.* for the payment of debts, a power to settle a limited jointure upon any after-taken wife; a power to raise portions for younger children; and a general power is given to all persons, who may be in possession, to make leases for three lives or thirty-one \*years, which is less than the power enjoyed by tenants in tail under the statute (3) in this country. There was also a power to jointure given to Harman.

[ \*16 ]

Upon this instrument the question now arises, was such a trust created, as the Court can mould according to the supposed intention of the parties? But I ought first to inquire, what the legal effect of the instrument would be, if the limitations were all legal ones? In this view the father is tenant for life, with remainder to trustees to preserve contingent remainders, and this remainder is not confined to the life of the father. Now, if the instrument stopped here, the cases of *Venables v. Morris* (4), and *Doe v. Hicks* (5), establish this, that if there be a general limitation of this kind, with the intention of preserving contingent remainders, not limited to the life of the father, although it may in construction be cut down to an estate for life in a will, and even in a deed, yet it cannot be so cut down if there are subsequent limitations which require the protection of such an estate; for it cannot be cut down

(1) 3 R. R. 513 (2 H. Bl. 594).

(4) 4 R. R. 455 (7 T. R. 342).

(2) 2 R. R. 324 (4 T. R. 39).

(5) 7 T. R. 433.

(3) 10 Car. I. sess. 3, c. 6.

so as to leave subsequent contingent limitations unprotected. I am now expressing myself simply upon the legal construction, without reference to the question of trust. This limitation, therefore, cannot be restricted, for here there are subsequent contingent interests, which require protection.

ROCHFORD  
v.  
FITZ-  
MAURICE.

But still treating the limitations as legal ones, and for that purpose considering the limitation to the trustees as confined to the life, the next limitation is to Harman in tail male; for as the law is now settled, an estate to one for life, followed by a limitation to the heirs of his body, is an estate tail; but if, \*in effect, there is here interposed a limitation to trustees to preserve contingent remainders, that would not vary the case, although indeed if we look back into the history of the cases, which have been decided upon limitations for life, followed by remainders to trustees, to preserve, &c., we shall find, that it was not decided until the case of *Colson v. Colson* (1), that where this limitation to trustees was interposed, such a union would take place as to create an estate tail. The case was afterwards much doubted. Lord HARDWICKE seems to have been dissatisfied with it, when he attempted, in *Bagshaw v. Spencer* (2), to evade the rule; and the question was again raised, in *Hodgson v. Ambrose* (3), where, however, the decision in *Colson v. Colson* was affirmed, and the rule finally settled. Then follows the limitation to Thomas for life, with remainder to his issue male, who would necessarily take as purchasers, for there are no words to create a limitation, which could coalesce with Thomas's life estate, and none to give the issue estates of inheritance; then come the limitations to the daughters in fee, with a shifting use over to the father. As far as any intention of the parties is to be considered (all this time, it must be remembered, I am speaking of the legal construction, without considering whether there was an executory trust), the powers, which followed, are not at all inconsistent with an estate tail, or adverse to that construction. This is not of much importance upon this branch of the case; but I may observe that the powers confer this advantage, they enable the party to bind the remainderman, without barring the entail.

[ \*17 ]

If, then, I were to give effect to this instrument, according to its legal limitations, merely moulding the limitation to preserve, I should execute a settlement, such as no reasonable man ever

[ 18 ]

(1) 2 Atk. 246, 247.

(3) Doug. 337.

(2) 2 Atk. 577; 1 Ves. Sen. 142.

ROCHFORD  
C.  
FITZ-  
MAURICE,

intended, and such as I have never met with in the course of my experience; for I should give the first son an estate in tail male, and the second son an estate for life only, and his issue male would also take for life only. There is an intention to make a provision for the issue of the two sons, which I could not thus effectuate, for the children of the first son would be altogether in the power of their father, and the children of the second son would only take estates for life, it being quite clear that under the words "issue male" they must take as purchasers, and that as purchasers they could take no greater interests. This certainly leads to the inference that something else was intended; and the question now is, can I give effect to that, which was intended?

I consider the rule of this Court to be perfectly well settled, and I never was more surprised than to hear it impugned. Where there is a marriage settlement, the marriage itself is not only a consideration to support the settlement, but in its objects furnishes an indication of intention that there should be what is called a strict settlement: the common form of such instruments shows the intention to provide for the general objects of a settlement. If a man agrees before his marriage to settle lands on his wife and children, it would be a manifest absurdity to execute that settlement, by limiting to himself an estate tail, which he might defeat the very next day; an estate which, in the view of the law, gives him the entire ownership of the property. That, indeed, would be a settlement in form, but not in substance. The Courts, therefore, have \*rationally held, that in these cases the intention is, to divest the husband of his old dominion, and to place the estates of the children out of the power of the father to defeat them.

[ \*19 ]

There was an exception to the general rule in the case of estates *ex provisione viri*; for there, as the wife could not alienate alone during coverture, and after coverture was disabled by the statute, the estate could not be barred without the concurrence of both husband and wife, and the necessity of this concurrence was deemed a sufficient security for the protection of the issue; as, however, the statute 11 Hen. VII. (1), has been repealed, as to estates *ex provisione viri*, by a late Act of Parliament (2), this exception will henceforth cease to be part of the law.

Now, as between the cases of voluntary settlements and wills there is no difference; if there be any, the former is the stronger,

(1) 11 Hen. VII. c. 20.

(2) 4 & 5 Will. IV. c. 92.

in favour of a strict settlement; but this case approaches very nearly to that of an ante-nuptial settlement, not merely because it was made for valuable consideration, but because it had for its object to provide for the settlor's sons and daughters. Now, when the father was tenant in tail, and meant to cut down his estate tail, and to create new limitations, it would be difficult to induce me to believe, that his intention was to divest himself of that estate, which would have carried the estate through the family, in order to create the like estate in his eldest son, which would have had no such operation. I never heard of a father making such a settlement.

ROCHFORD  
C.  
FITZ-  
MAURICE

This settlement is one for valuable consideration, not \*merely because the wife releases part of the lands from her jointure, but because she had also agreed, in a certain event, to relinquish part of her jointure itself, for it appears from the indorsement, that in the event of Mrs. Jenkins, the prior tenant for life, surviving Mrs. Fitzmaurice, she had agreed to relinquish 100*l.* per annum. This, therefore, was a consideration, which might or might not be held to extend to the settlement made upon her children by her husband.

[ \*20 ]

Taking, however, this to be a voluntary settlement, let us look at the case in that light. Voluntary settlements and wills generally stand upon the same footing. The settlement cannot stand upon a footing inferior to that of a will; for the very act of making the settlement *inter vivos* rather leads to the inference, that a strict settlement was intended; in both, however, the rule of law is clear; the intention must be collected from the four corners of the instrument, and the nature of the instrument does not enable the Court to say that a strict settlement was intended. In marriage settlements, the nature of the instrument leads to that conclusion; but in the case of a voluntary settlement, or even a settlement for valuable consideration, not upon marriage, there is nothing irrational in a limitation to a son of the settlor in tail; it may be improvident, but it is difficult to say, that it could not have been intended. I must suppose, that those, who use technical words, intend to use them in a technical sense, unless something to the contrary appears. In this case then, I must look for the intention upon the face of the instrument itself. If I come to the conclusion that it is an executory trust, there is no difference whatsoever between executory trusts, whether created by marriage articles, by a voluntary settlement, or by a will. There is, \*indeed,

[ \*21 ]

ROCHFORD  
v.  
FITZ-  
MAURICE.

in the latter case, much greater difficulty in arriving at the conclusion that the trust is executory; for, in the first case, the nature of the instrument establishes the fact; in the others, it must be collected from the nature of the dispositions in the instruments. In the present case there can be no room for doubt, that the trust is executory; all trusts, to be sure, are in some sense executory, because the nature of a trust implies something to be executed; but here the settlor covenants to convey the property to trustees, to be settled to the uses aftermentioned, as counsel shall advise.

I admit, that although this trust is so far executory, as to leave something to be done, yet the party may afterwards have become, as it is styled, "his own conveyancer," that is, he may have defined so clearly his intention as to the limitations of the settlement, as to leave no room for ambiguity or doubt; if he had done so, I must have given to the words he has used their legal operation; but he has not done so here, for as I have already shown, his intention is far from being clearly expressed.

Can I make Harman tenant in tail, and his brother Thomas tenant for life only, giving to the words merely their strict legal construction? The words "as counsel shall advise," must be read as qualifying the dispositions; you would not go to counsel, and ask his advice merely as to the proper form of conveyance to be used, whether feoffment, bargain and sale, or lease and release, but you would also inquire, how the limitations should be framed. I must sacrifice something. I cannot effectuate the intention as to Thomas and his issue male, without taking some liberty with the limitation to Harman. In my opinion, I shall do less violence to the language of this instrument, by treating \*the limitation to the heirs of the body of Harman, as words of purchase, and confining him to his life estate, than by the contrary construction. If I leave the words to their natural meaning, the heirs male of Thomas cannot be provided for, according to what was the manifest intention of the settlor; and if I remould the words "issue male," I must submit the words "heirs male of the body" to the same operation. It was only after a long struggle that the Courts came to the conclusion, that in any case, such limitations as those to Harman, and the heirs male of his body, with an interposed remainder to trustees to preserve, created an estate tail; and that is important, now that I am dealing with what is executory. I am, therefore, at liberty to say, that the words here were not employed in their ordinary sense. Indeed, looking through the whole of the instrument, it is apparent,

[ \*22 ]

ROCHFORD  
F.  
FITZ-  
MAURICE.

that the framer had no real knowledge of the signification of the terms which he used; where the previous deeds are recited, he never inserts words of limitation; he never ventures to say what estates were created under those deeds; the whole instrument manifests ignorance and want of skill, and we therefore see why the intentions of the parties were not properly executed. Here the father is tenant for life, with the remainder to the son for life, the life estate of the father exceeding in interest the life estate of his son, in consequence of the clause without impeachment of waste. No doubt, the non-repetition of the clause, "without impeachment of waste," is an argument against an estate for life. But it is said, that no power is given to the sons to raise portions for younger children; now that is not unusual in a settlement; I take it for granted, that it was not intended to give this power; and this also accounts for making the sons tenants for life, not repeating the clause without "impeachment of waste." The father had a desire, \*which is perfectly natural, to possess more power over the estate than his sons were to enjoy. Putting these things aside, I find Harman tenant for life, remainder to trustees during his life to preserve contingent remainders, in the view of this Court, remainder to the heirs male of his body. But the words by which this life estate is created, are very peculiar; they are composed of the limitation for life, and of the words which would be properly used, if there had been an actual estate to preserve contingent remainders interposed; it is, "to the use and behoof of the said Harman Fitzmaurice, the said eldest son of the said James Fitzmaurice, and to permit and suffer the said Harman, and his assigns, during the natural life of the said Harman, to take the rents, issues and profits," &c. And so in the limitation to Thomas, "to permit him to receive the rents," &c.; as if in each case there had been an interposed remainder; and if I find an estate limited to preserve contingent remainders, and then a limitation to the heirs of the body, and I must make some alteration, the question is, whether I must not make such an alteration as will render the whole consistent. The expression "issue male" I can mould, without difficulty, to mean first and other sons; and can I not mould the words "heirs of the body" with equal facility? There is no difficulty.

I have the authority of *Glenorchy v. Bosville* (1), and many other cases. That case came first before Lord King, and afterwards before Lord Talbot; it was a devise to trustees, to convey to A., for

(1) Cas. t. Talb. 4.

[ \*23 ]



ROCHFORD  
v.  
FITZ-  
MAURICE.  
[ \*24 ]

life, without impeachment of waste, remainder to the issue of A.'s body, and Lord KING said, he should "make no difficulty of determining it an \*estate tail, had this been an immediate devise; but when you apply to this Court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law, to follow the testator's intent? which also brings on another question, what is the testator's intent in the present case?" The opinion of the Judges was taken, and it came to a hearing before Lord Talbot, and he decided, that he was bound to execute the intent, and decree it an estate for life, with remainder to the first and other sons; and the note says, "this case appears to have been decided upon the principle of a distinction existing between legal and equitable estates, and between trusts executed, and trusts executory; Lord TALBOT admitting the word, 'issue,' in a will, to be as proper a word of limitation as 'heirs of the body.'" In the case of *Meure v. Meure* (1), the gift was, by will, to trustees, to purchase lands in trust, to permit the plaintiff to receive the rents and profits for his natural life, and after his decease, then in trust for the use of the issue of the body of the plaintiff. Sir JOSEPH Jekyll, deciding that the plaintiff took an estate for life only, refers expressly to the nature of the limitations; he said, "there is something in this will, that denotes the intention of the testator, that the plaintiff should only take an estate for life, for there is a distinction between the wording and framing of the limitations; in the first place, the estate is during the lives of the defendant Andrew, and the plaintiff, to continue in the trustees; and when the testator limits it to the plaintiff for life, it is to permit and suffer the plaintiff to receive the rents and profits, &c.; and when the limitation is to the issue, it is to their use and behoof, and the Court should, as much as they can, preserve the intention \*of the testator." The words of the devise in that case were somewhat peculiar, but the words here are just the same; the limitation is to the use of Harman Fitzmaurice, and to permit and suffer the said Harman to take the rents, &c. So far, the case falls exactly within the observations of the MASTER OF THE ROLLS. The same doctrine was held in the modern case of *Stonor v. Curwen* (2).

[ \*25 ]

Two cases were referred to in the argument, as proving the power of the Court to make a strict settlement in the present case. The first was *White v. Carter* (3). There was a devise to trustees of

(1) 2 Atk. 265.

(3) 2 Eden, 366.

(2) 35 R. R. 156 (5 Sim. 264).

ROCHFORD  
v.  
FITZ-  
MAURICE.

money to be laid out in land, and settled as counsel should advise, in trust for A. and his issue in tail male, to take in succession and priority of birth; and it was considered properly enough, that the words in "priority of birth" indicated the intention of the testator that there should be strict settlement, and it was so decreed first by Lord NORTHINGTON, and then by Lord CAMDEN, upon a rehearing. Lord CAMDEN said (1), "the testator directs the settlement to be made by advice of counsel, and in succession and priority. He meant something different from an estate tail, when he wanted the assistance of counsel." The other case was much stronger, that of *Bastard v. Proby* (2). The gift there was to trustees in trust when the lady attained her age, "as counsel should advise, to convey, settle, and assure the said manors, &c., unto or to the use of or in trust for the said Jane, for her life; and after her death, then on the heirs of her body." That was the most naked case, that could possibly occur. There was nothing whatever in the will, except the expression "as counsel should advise," to warrant the Court to interfere in modelling the settlement; yet these words were held sufficient for that purpose. The case was heard before Lord Kenyon, who perfectly understood that branch of the law, and the counsel happened to be *Mr. Scott* and *Mr. Mitford*, afterwards Lords ELDON and REDESDALE, who both gave up the point, that the trust was not executory. It would be impossible to persuade me, that this case was not a decision of very considerable authority. If, therefore, a settlement is directed to be made, as counsel should advise, on a person for life and the heirs of his body, counsel would make him tenant for life, and interposing an estate to preserve contingent remainders, would make the first and other sons tenants in tail.

[ \*26 ]

It is stated, however, that this case had been overruled, and that there is much difficulty in consequence of some of the early decisions; for this reason I took time to consider the case, and have looked into all the authorities. In *Leonard v. The Earl of Sussex* (3), there was a devise, and there were clear words, showing that the intention was to make a strict settlement. The LORD KEEPER makes this observation: "She has declared her mind to be, that her sons should not have it in their power to bar their children, which they would have, if an estate tail was to be conveyed to them; and took it to be as strong in the case of an executory devise for the benefit of the issue, as if the like provision had been contained in marriage

(1) Ambl. 670.

(2) 2 Cox. 6.

(3) 2 Vern. 526.

ROCHFORD  
v.  
FITZ-  
MAURICE.  
[ \*27 ]

articles." This may be said to show clearly the power of the Court to mould the limitations according to the intention, and also the nature of the distinction between marriage articles and wills, \*which I have already referred to; for the moment the Court got at the intention that a strict settlement was to be made, it had no difficulty. It had, then, the same right to deal with the will as with a marriage settlement; the intent must, in both cases, be effectuated, and that is all the LORD KEEPER meant to say. A subsequent case, decided on the same principle, is *Legatt v. Sewell* (1), reported in the same volume, where the Court was of opinion, that the case arising upon "a voluntary devise, although executory, was to be taken in the very words of the will as a devise." It is said these cases are opposed to each other; and, doubtless, they would appear so, if they were taken generally and placed in juxta-position; but if considered in relation to the facts and circumstances of each case, they are quite consistent. In the one case, the trust was to be executed by the Court; in the other, though the trust was executory, the Judge thought it would not have been according to the intent to have directed a strict settlement. This case is also reported in *Peere Williams* (2), and it appears that the opinion of the Judges of the Common Pleas was taken. There was a difference of opinion amongst the Judges, and the LORD KEEPER desired an ejectment should be brought to try the question; but it is not very clear that the case was ever decided. In *Bale v. Coleman* (3), there was no pretence for saying the trust was executory. However, a difference of opinion there existed, for it was decided one way by Lord COWPER, and the other way by Lord HARCOURT. The well-known case of *Trevor v. Trevor* (4) went still farther. There is no doubt now, but that the trust there was executory. It was carried into the Lords (5), and there \*was a difference of opinion, the LORD CHANCELLOR, with Lord NOTTINGHAM, being for the decree, and Lord TREVOR and Lord HARCOURT against it. The decree was affirmed, and it is sufficient now to say, that this case of *Trevor v. Trevor* has placed the doctrine beyond the possibility of a doubt. I think, therefore, that no difficulty arises upon the early authorities.

[ \*28 ]

It was asserted at the Bar, that Sir WILLIAM GRANT's judgment, in the case of *Blackburn v. Stables* (6), had either been incorrectly reported, or that that case had overruled *White v. Carter*, and

(1) 2 Vern. 551.

(2) 1 P. Wms. 87.

(3) 1 P. Wms. 142; 2 Vern. 670.

(4) 1 P. Wms. 622.

(5) 5 Br. P. C. 122, Toml. ed.

(6) 13 R. R. 120 (2 V. & R. 367).

overturned the whole doctrine. The observations of the learned Judge are certainly not incorrectly reported. No Judge was more particular about his judgments. He was in the habit of carefully perusing them, and if there had been anything wrong in that judgment, he would, I doubt not, have had it corrected.

ROCHFORD  
v.  
FITZ-  
MAURICE.

How it can be argued, that *Blackburn v. Stables* has overruled *White v. Carter* and the early cases, I am at a loss to discover. I have read that case several times, and I cannot find a single expression of Sir WILLIAM GRANT's calculated to lead to such a conclusion. That was a devise in trust for the son of the testator's nephew, at the age of twenty-four, and if he had no son, to a son of a great nephew of the testator's; and the testator directed that his executors should not give up their trust until a proper entail was made to the male heir of the person, who should take under the dispositions of his will. Sir WILLIAM GRANT there held that the son of the testator's nephew was entitled to a conveyance of the estate in tail male; the concluding clause of the judgment \*shows the grounds upon which the case was decided. He says (1), "there is nothing in the context of the will from which it can be collected, that the testator did not mean to use the words in their technical sense. There is an absence of every circumstance that has commonly been relied on as showing such intention. The word is 'heir,' not 'issue;' there is no express estate for life given to the ancestor; no clause that the estate shall be without impeachment of waste; no limitation to trustees to preserve contingent remainders; no direction so to frame the limitation, that the first taker shall not have the power of barring the entail. Every thing is wanting that has furnished matter for argument in other cases; the words are, therefore, to be taken in their legal acceptance." That was the ground of the decision, not the supposed distinction between marriage articles and wills, for he says, in the commencement of his judgment, "I know of no difference between an executory trust in marriage articles and in a will, except that the object and purpose of the former furnish an indication of intention, which must be wanting in the latter;" and he goes on to say, "in the case of a will, the subject being mere bounty, the intended extent of the bounty can be known only from the words, in which it is given; but if it is clearly to be ascertained from anything in the will, that the testator did not mean to use the expressions, which he has employed in their strict, proper, and

[ \*29 ]

(1) 13 B. R. 123 (2 V. & B. 371).

ROCHFORD  
F.  
FITZ-  
MAURICE.

technical sense, the Court, in decreeing such settlement as he has directed, will depart from his words in order to execute his intention." There is not a word here like an overruling of the previous cases. Whether that case was or was not rightly decided upon the intention is another question. In the argument of [ \*30 ] *Jervoise v. \*The Duke of Northumberland* (1), Lord ELDON was pressed with some general observations which had fallen from him in *The Duke of Newcastle's* case (2); no doubt his words did require some explanation; but in *Blackburn v. Stables* there was nothing that required explanation, for it never was supposed, that that case had established a new rule. Lord ELDON took great pains to remove the erroneous impression which had existed. He says that he never meant to say what had been imputed to him, and he states (3) "so again, that I may not be misunderstood, if it is supposed that I said that there was no difference between marriage articles and executory trusts, and that they stood precisely upon the same grounds, I never meant to say so. In marriage articles, the object of such settlement, the issue to be provided for, the intention to provide for such issue, and, in short, all the considerations that belong peculiarly to them, afford *prima facie* evidence of intent, which does not belong to executory trusts under wills. But I take it according to all the decisions, allowing for that, an executory trust in a will is to be executed in the same way;" that is, when you have found out the intention, there is no distinction, as I before said, between the case of an executory trust created by a will, and one created by a settlement. Sir WILLIAM GRANT did not mean, in *Blackburn v. Stables*, to impeach the previous authorities, and Lord ELDON, in *Jervoise v. The Duke of Northumberland*, took care to remove any doubt, which might have arisen in consequence of the expressions imputed to him. Upon the whole, I have come to the conclusion, that the rule of law is as well settled as [ \*31 ] \*I thought it was, that no rule is better settled, that none stands on a more solid foundation.

As regards the present case, I have satisfied myself (not without difficulty), that there is upon the face of this instrument sufficient evidence of the intention of the parties, not to use the expressions, which have been employed, in their strict technical sense; that there is nothing in this settlement to prevent my giving effect to that intention, and that I must, therefore, hold that Harman

(1) 21 R. R. 229 (1 Jac. & W. 559).

(3) 21 R. R. 236 (1 Jac. & W.

(2) 12 Ves. 218, 227. See 4 R. R. 37. 574).

Fitzmaurice was tenant for life only of these lands, with a remainder to his sons as purchasers. I must, consequently, dismiss the bill, and with costs, for the plaintiff had the judicial opinion of the MASTER OF THE ROLLS against him upon the construction of the settlement, before the bill was filed.

ROCHFORD  
v.  
FITZ-  
MAURICE.

### MOLONY v. KERNAN.

(2 Dr. & War. 31—42.)

1842.  
Jan. 12, 13.

A party, who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has the same liability of sustaining the lease cast upon him that the agent has, and if the lease cannot be upheld by the agent, neither can it be supported by the purchaser from the agent.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 31 ]

THE bill in this case was filed for the purpose of setting aside a certain lease, of the 1st of May, 1832, and an assignment thereof, which had been obtained under the following circumstances :

The plaintiff, Henry Molony, was entitled under his father's will, as tenant for life, to certain lands in the county of Clare, of which the mountain called Slievanore, the subject of the lease in question, formed a part, with remainder \*to his first and other sons in tail male ; and in the will there was contained a power to the said plaintiff to make leases for twenty-one years, in possession, and at the best improved rent.

[ \*32 ]

In the year 1826, the plaintiff was put into possession of the property, and thereupon appointed Mr. Edward Kernan, one of the defendants, his land agent and receiver, and executed a power of attorney, authorizing him to receive the rents, and entrusted him generally with the care and management of his property.

It appeared that the premises in question, the mountain of Slievanore, were, at the period before mentioned, in the occupation of yearly tenants, persons of the name of Connor and Keily, at rents amounting in all to a sum of 36*l.* 18*s.* 4*d.* annually ; and that in the several accounts furnished by Kernan, between the years 1828 and 1832, these tenants were returned in a progressively increasing arrear, which, in the year 1832, amounted to a sum of 51*l.* 10*s.* 6*d.*

The bill stated that the defendant, Kernan, had made frequent applications to the plaintiff for a lease of the said mountain, which the plaintiff, who was wholly ignorant of the value of the property, at length agreed to grant, influenced as well by the increasing

MOLONY  
v.  
KERNAN.

arrear of rent on the tenants' parts, as also by the representations of Kernan, that he would then reside on the property, and thereby be enabled to attend to other parts of the plaintiff's estate. The lease, which was accordingly executed, bore date the 1st of May, 1832, and was for twenty-one years, and at a rent of 50*l.* per annum.

[For the purposes of this report it is sufficient to say that the LORD CHANCELLOR was of opinion that the lease had been improperly obtained by Kernan, who had obtained an advantage at the expense of his principal, the plaintiff, by the suppression of information which it was his duty as agent to have disclosed to the plaintiff.—O. A. S.]

[The defendant Sampson claimed to be a *bonâ fide* purchaser for value of the lease, and produced an assignment of the lease from Kernan to himself, dated the 2nd May, 1834, in consideration of 210*l.* paid by himself to Kernan, but he did not prove the actual payment of the money. Sampson was aware that Kernan was the agent of the plaintiff.

THE LORD CHANCELLOR (after stating the facts) said :]

[ 40 ]

Now, as to Kernan, there is not a shadow of defence; he abandoned his duty as agent; the tenants' rents are all in arrear; his own rent is likewise wholly unpaid; and he improperly obtains a benefit, at the expense of his principal. The relief, therefore, now sought, as against him, is quite of course.

The defendant Sampson then comes forward and says, I am a *bonâ fide* purchaser for valuable consideration paid, and without notice, and according to the rules and principles of this Court, I am entitled to the protection of the Court. I purchased *bonâ fide*, and I saw nothing in the case to raise a suspicion of any *mala fides*. Now, if this defence were made out, he undoubtedly would be entitled to the full benefit of it. But this defence has not been made out in proof. As to the payment, all that has been proved is, that some piece of paper passed between the parties, but it may be that no actual payment was to be made, until it was ascertained that the title would not be impeached.

But even if the defendant had proved the payment of the purchase money, I should have had no difficulty, not because this was a lease made to an agent, for as I have before said, an agent may take a lease, but because a party who buys from an agent, with distinct notice that the party with whom he is dealing is an

agent, has cast upon him the liability of sustaining the lease, just as much as the agent himself; and if the lease could not be upheld by the agent, neither could it be supported by a purchaser \*from that agent, if he deals with him in his character of agent.

MOLONY  
c.  
KERNAN.  
[ \*41 ]

[His Lordship then adverted to certain correspondence and evidence which conclusively showed that Sampson was aware that Kernan was the agent of the plaintiff, and his Lordship concluded his judgment by saying:]

There appears to me to be \*nothing to distinguish Sampson's case from that of Kernan's, even if he had proved his alleged title of purchaser for valuable consideration, but in that he has completely broken down.

[ \*42 ]

*Mr. Serjt. Warren, Mr. Brooke, and Mr. H. G. Hughes, for the plaintiff.*

*Mr. Moore for the defendant Kernan, Mr. Monahan, Mr. O'Brien, and Mr. Brereton, for the defendant Sampson.*

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### ENRAGHT v. FITZGERALD.

(2 Dr. & War. 43—50; S. C. 1 Con. & L. 181.)

1842.  
*Jan. 13.*

On a decree for the specific performance of a contract, for the purchase of a reversion expectant on a lease for lives, the vendor is entitled to interest on the purchase money, from the day on which a good title was first shown.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 43 ]

In future the Court will add to the reference, as to whether a good title can be made, a direction to the Master, at the request of either party, to inquire and report at what time a good title was shown.

THIS was a suit for the specific performance of an agreement for the purchase of certain lands, in the counties of Clare and Tipperary. The bill was filed on the 30th of April, 1836, by the trustees and devisees under the will of John Walcott, against the real and personal representatives, and devisee, of James C. Fitzgerald, the person who had contracted to purchase. The interest in the lands which was the subject-matter of the contract, was a reversion expectant upon a lease for lives, some of which were in existence at the time the agreement was entered into. The terms of the proposed sale appeared from certain letters which were proved in the cause; on the 19th of August, \*1833, James C. Fitzgerald wrote to the plaintiff's agent, proposing a transfer of 6,600*l.* New Three-and-a-half per cent. Government Stock, as the price of the reversion; and, this offer having been objected to, on the 12th of September

[ \*44 ]



ENRAGHT  
v.  
FITZGERALD. following, he again wrote to the vendor's agent, thus: "I accept your proposal of making this purchase a cash transaction instead of a transfer of stock &c., I shall take it upon myself to conclude the transaction by agreeing to your proposal of paying down 6,400*l.* in cash, on the day that the purchase shall be finally concluded." Some difficulties having been raised to the vendor's title, in consequence of the misnomer of one of the trustees in Mr. Walcott's will, the testator having written Everaght instead of Enraght, this suit became necessary, and on the 5th of June, 1837, a decree was pronounced, by which it was declared that the plaintiffs were entitled to a specific performance of the contract, and it was referred to the Master to take an account of the real and personal estate of James C. Fitzgerald, and of the incumbrances affecting the same, and also to inquire "whether a good and satisfactory title to the lands and premises in the pleadings mentioned, could be made by the plaintiffs, and at what time they were enabled to convey the same." On the 12th of July, 1839, the Master made his report, and after setting forth the accounts as above directed, reported upon the title in the following terms: "I find that a good and sufficient title to the fee simple and inheritance of the lands in the pleadings mentioned, can be made out, and that the plaintiffs were, previous to the filing of the bill in this cause, on the 30th of March, 1835, enabled to convey the same."

[ \*45 ]

To this report no exceptions were taken upon either side, and the cause came on to be heard for further directions before \*Lord Plunket on the 11th of November, 1839. The only questions then raised were, first, from what time the purchaser was liable to pay interest on the purchase money; and secondly, how the costs of the suit should be disposed of. It appeared that the interest of the purchase money considerably exceeded the amount of the rents reserved in the leases above-mentioned, and the plaintiffs contended, that they were entitled to interest from the 28th of March, 1835, the day mentioned in the report as the time, when the plaintiffs were in a condition to convey the lands; the defendants insisting, on the other hand, that they were only liable to pay interest from the date of the report.

By the decree then pronounced, it was, among other things, ordered, that the defendants should pay to the plaintiffs the amount of the purchase money, with interest from the date of the report: until paid, "together with the plaintiffs' costs subsequent to the former hearing of the cause, including the said decretal order of the

5th of June, 1837, and the proceedings thereunder, and of this hearing."

ENRAGHT  
v.  
FITZGERALD.

The plaintiffs, being dissatisfied with the former part of this direction, and the enrolment of the decree having been vacated on the ground of irregularity, presented their petition of rehearing, and the cause now came on to be reheard.

*Mr. Serjt. Warren, Mr. Brooke, and Mr. Keller, for the plaintiffs:*

The vendors are clearly entitled to interest upon the purchase money from the day on which the contract should \*have been completed. [They cited *Paine v. Meller* (1), *Davy v. Barber* (2).] [ \*46 ]

*The Attorney-General and Mr. T. B. C. Smith, for the defendants:*

Although the Master found that the plaintiffs had shown a good title to the fee, it does not necessarily follow that there may not have been some formal objections in the way \*of an actual conveyance to the purchaser: and this appears to have been the case as a matter of fact; for instance, one of the charges which affected the lands was not released until the month of October, 1838. [ \*47 ]

THE LORD CHANCELLOR:

The subject-matter of the sale in this case, was a reversion expectant on a lease for lives. In such cases, generally speaking, a purchaser must pay for the wearing out of the lives; for as the lives wear, the reversion becomes more valuable, approaching nearer to the possession; and, in that view, the time becomes equivalent to receipt of the rents and profits.

The contract here is of a peculiar nature. The purchaser, in the first instance, represented that he had a certain amount of stock; and afterwards, in the letter of the 12th of September, 1833, agreed to pay down 6,400*l.* (the amount of the purchase money) in cash. Now, when a man has lost the benefit of the interest of money which has been lying idle, the question always arises, by whom that loss is to be sustained? But no loss appears to have been incurred in this case; the money has not been lying idle, no interest has been lost; the purchaser had his stock, and was in receipt of the dividends; and yet, this purchaser now comes to the Court, and says, let me take the reversion in its present state, after the wear and tear of the

ENRAGHT  
v.  
FITZGERALD.  
[ \*48 ]

lives, at the price agreed upon at the time of the original contract : in other words, give me that, which is more valuable than what originally I bought, and charge me \*nothing for the increased value. I cannot allow both. The wearing of the lives, as I before said, is equivalent to the receipt of rents. Interest should be given from the very hour, when the report found that the vendor could have conveyed, and the purchaser takes the estate with the rents and the benefit of the wearing of the lives. The former decree only gave interest from the date of the report of a good title.

The bill originally was filed for the purpose of removing a mere technical objection ; a trifling error had occurred, a mistake of a letter, I think, the testator (whose estate was the subject of the sale) having by some mistake in his will, called one of the plaintiffs, Mr. Enraght, by the name of Everaght, for Enraght. However, a bill was considered necessary. This was a fortunate circumstance for the purchaser, for two years' interest was saved, and he had the benefit of the wear of the lives during that period.

In England the rule is (and I shall certainly adopt it here), in every case of specific performance, to add, as of course, to the reference, as to whether a good title can be made, a direction, if so —at the request of either party, let the Master inquire and report at what time a good title was shown. Formerly this reference was never made until the report came back for further directions, and then the case was sent to the Master, for the purpose of this inquiry. The present practice was established by Sir JOHN LEACH, with the approbation of the Bar. Here the reference was, to inquire whether a good and satisfactory title to the lands and premises in the pleadings mentioned could be made by the plaintiffs, and at what time they were \*enabled to convey the same ; in effect almost the same thing, and the Master reports, that they were able in 1835 to convey the fee simple, or, more accurately, a good title.

But then, it is said, that the proceedings in the office before the Master show, that the vendors were not able at that time to convey a good title ; but the report speaks for itself. Some mere formal matters, altogether immaterial, may have remained to be settled : but with the Master's finding no fault was found, for the report was unexcepted to.

But I would ask, why were costs given against the purchaser, if, as has been contended, he was perfectly right, and the vendors altogether wrong ? The opinion of Lord PLUNKET, it is plain, must

have been, that the purchaser was in default, and this must have been the opinion of his counsel too, for if not, why did they not raise a counter question as to these costs, upon this rehearsing? I cannot consider this direction, which is unobjected to, right upon any other ground than this supposition, that the purchaser has been in the wrong. From the filing of the bill, up to the first decree, he was perhaps right; but in every other part of the case, he has been in the wrong.

ENRAGHT  
v.  
FITZGERALD.

There is, no doubt, some difficulty on the general question, in the case of sales of reversions, where so much time has been permitted to intervene between the inception and completion of the contract. However, I have nothing to do with that on the present occasion; the purchaser ought to \*have accepted the title, from the time when the report found that a good one could be conveyed. The former decree must, therefore, as it appears to me, have proceeded upon some misapprehension.

[ \*50 ]

### LAMPHIER v. DESPARD.

(2 Dr. & War. 59—66; S. C. 1 Con. & L. 200.)

1842.  
Jan. 22, 24.

A testator by his will directed that his debts and legacies should be paid by his brother, whom he appointed his executor and residuary legatee; he then charged two legacies, of three given by his will, on the timber growing on his estate of Finane, and bequeathed that timber to the same brother: Held, that the general personal estate of the testator was exonerated from the payment of those legacies.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 59 ]

A gift of "household furniture, plate, house linen, and all other chattel property" is not a general bequest of the entire personal estate, for the words "all other chattel property" must be restricted by the principle "*ejusdem generis*."

THOMAS DESPARD made his will, dated the 1st of December, 1828, as follows: "I order and direct that all my just debts and legacies hereafter mentioned, shall be paid by my brother, the Rev. James W. Despard. Whereas I am seised with the lands of Finane, in the county of Tipperary, under a lease of lives renewable for ever, I give, devise, and bequeath the said lands of Finane to my wife, Caroline Despard, for and during the term of her natural life;" with several remainders over.

The testator then bequeathed to his wife, in fee simple, his share of a certain house in the town of Portarlinton, and proceeded thus: "I also leave and bequeath to my said wife, all my household furniture, plate, house linen, and all other chattel property, that I may die seised or possessed of. I leave and bequeath to my brother,

LAMPHIER  
v.  
DESPARD.

[ \*60 ]

the Rev. James W. Despard, the woods and all timber growing on the lands of Finane aforesaid, to pay my debts and legacies. I leave and bequeath to my niece, Eliza Baker, the sum of 150*l.*, and to my niece, Henrietta (1) Baker, the sum of 150*l.* ; which sums are not to be paid to my said nieces until five years after my decease, as it is my wish that the woods on the lands of Finane shall not be cut down, until said five years have elapsed ; but that they shall be thinned every year during that time, under the directions of the Rev. James W. Despard, and the proceeds thereof to be paid to my said wife. And I will and bequeath, that the said Rev. James W. Despard shall, after the timber of said woods is disposed of, pay to my niece, Katherine Despard, such sum or sums of money, as said timber shall produce, after having paid the \*legacies to my nieces, Eliza and Harriett (1) Baker as aforesaid, and paying all expenses attending on said cutting and disposing of said timber. And I will and bequeath to my sister-in-law, Mary Anne Cary, the sum of 10*l.*, to buy mourning."

And lastly, after giving certain directions relative to the payment of his father's debts, the testator concluded in the following words : " I do hereby appoint my brother, the Rev. James W. Despard, of Castlecomer, executor and residuary legatee to this my last will and testament."

Upon the testator's decease, his widow, Caroline Despard, entered into possession of the lands of Finane, and by her the said lands were, in the year 1836, demised to the defendant, William Despard. The timber on these lands was not cut down at the time directed by the will, but was standing at the period of the institution of this suit.

By mesne assignments, the legacies bequeathed to the testator's nieces, Eliza and Harriett, became vested in the plaintiff, Vernon Lamphier.

Under these circumstances the bill was filed, to raise the amount of the legacies given to Harriett and Eliza Baker ; and in it were made defendants, the Rev. James W. Despard, Caroline Despard, the testator's widow, and also William Despard, and Katherine, his wife.

[ \*61 ]

The defendants, by their answers, did not controvert the plaintiff's right to the amount of the said legacies ; but a question was raised, upon the construction of the said will, \*between the defendants, James W. Despard and William Despard, as to the party primarily liable to this demand.

*Mr. Moore and Mr. Loftus Bland*, for the plaintiff.

LAMPHIER  
v.  
DESPARD.

*Mr. Serjt. Warren and Mr. George*, for the Rev. James W. Despard and Caroline Despard, contended, that the legacies in question were demonstrative, to be paid out of the proceeds of the timber directed to be sold for that purpose, as the primary fund, and insisted that there was no residuary personal estate.

*Mr. Edward Wright*, for William Despard, the party in possession of the timber, submitted that the legacies were general; that the words of the gifts did not include any mention of the woods, or any direction, such as, "to be paid out of," &c.; and argued, that the words "all other chattel property," were not sufficient to pass to the widow of the testator his general personal estate.

THE LORD CHANCELLOR:

Jan. 24.

The question now arises, out of what funds, upon the true construction of this instrument, are the legacies, bequeathed to the testator's nieces, Harriett and Eliza, to be paid? It is said there are no debts, and also that there is no residuary personal estate, the residuary legatee conceiving that under the bequest to the testator's widow of "all other chattel property," the whole of the testator's personal estate had passed to her; but for this proposition there is no foundation in law; the gift is of his "household furniture, plate, house linen, and all other chattel property," \*the latter words must be construed by those with which they are associated, and must be held to mean all other chattel property *ejusdem generis*; they clearly would not pass money, the clause is not a general bequest of the entire personal estate, and besides there is a residuary gift in the will. I assume, then, that there are both debts and a residuary personal estate, and I shall, therefore, direct an account of the debts, and of the personal estate of the testator.

[ \*62 ]

The question of law is not whether these are demonstrative legacies, but whether they are so given out of a particular fund, that that fund is to be primarily appropriated to the payment of those legacies in exoneration of the general personal estate.

There is a peculiar feature in this will not to be found in any other case; first, there is a general direction that the testator's just debts and legacies should be paid by his brother, Mr. Despard, and the same Mr. Despard is the devisee of the timber (the fund particularly pointed out for the payment of the debts and legacies),

LAMPHIER  
v.  
DESPARD.

[ \*63 ]

and also the residuary legatee and executor. Now, independently of the personal estate being the proper fund for the payment of debts and legacies, the case of *Powell v. Robins* (1), and other authorities show, that where there is a direction in a will that debts shall be paid by a particular individual, any property given to that person is, without further words, held to be charged with the payment of those debts. The question here is, what is to be done where there is a particular fund charged, and the general personal estate is not in \*words exonerated, and both the particular fund, and the general personal estate are given to the individual, by whom the debts and legacies are directed to be paid. Clearly it is not necessary to express, in so many words, the intention to exonerate the personal estate? This was established by *Boottle v. Blundell* (2), where all the authorities were reviewed and elaborately discussed by Lord ELDON, and where he complains (like all other Judges) of the great uncertainty and contrariety of the decisions upon the subject. But still I must find upon the face of the will, a clear intention to exonerate the personal estate. There were two cases before Sir John Leach, *Greene v. Greene* (3), and *Michell v. Michell* (4), which went far to establish this, that where there first appears an intention to give the whole personal estate, and then a real estate is charged with the debts, the legatee will take the personal estate exonerated.

Undoubtedly, the soundest rule originally would have been this, that, if there are express words of dedication of a portion of the real estate, and the testator disposes of the personal estate, the fund, which the testator has himself provided for the purpose, should be the primary fund. But the current of authorities runs the other way.

[ \*64 ]

It is clear, that as far as regards the debts, the personal estate is, in this case, the primary fund, and there is no express exoneration. But, in relation to the legacies, the question is very different; they are of the testator's own creation. It is true, so are, or at least so may be, the debts; but the legacies depend altogether upon his pleasure, as to the \*fund out of which they are to be satisfied, whilst the debts are provided for by the law.

Now observe in this case the express and cautious direction to pay the legacies out of the woods and timber. This is not a case in which the timber is a fund to be resorted to, if the personal estate should prove insufficient; on the contrary, the testator has

(1) 7 Ves. 209.

(2) 15 R. R. 93 (3 Mer. 193).

(3) 20 R. R. 284 (4 Madd. 148).

(4) 21 R. R. 280 (5 Madd. 69).

actually severed, in law, the timber from the estate, and directed that it should be applied as the fund for the payment of the legacies. No doubt, when he first speaks of the timber, he, in like manner, directs that it shall be applicable also in payment of the debts, as well as the legacies; but at the conclusion of the will, he alters his language, and when speaking of the manner in which the produce of the timber is to be disposed of, he says, “and I will and bequeath, that the said Rev. James William Despard shall, after the timber of said woods is disposed of, pay to my niece, Katherine Despard, such sum or sums of money as the said timber shall produce, after having paid the legacies to my nieces, Eliza and Harriett Baker, as aforesaid.” This is a minute criticism, but still a fair one, in endeavouring to arrive at the supposed intention of the testator. But the ground upon which I hold it clear, that the personal estate is in the present case exonerated, is this, that this is not a general fund provided for the payment of all the legacies, but a fund only for two; and whenever there is a direction to apply a particular fund for the payment of some of the legacies, that is the primary fund for this purpose, *Hancox v. Abbey* (1). It is perfectly immaterial that there is here only one other legacy; the principle is the same. The legacies are not charged on the \*personal estate in terms, and they would at all events be payable out of the particular fund, in consequence of the direction given to Mr. Despard. I must, therefore, declare, that the timber is the primary fund for payment of these legacies, but only the secondary or auxiliary fund for the payment of the debts. The costs of the cause must come out of the residuary personal estate.

LAMPHIER  
v.  
DESPARD.

[ \*65 ]

## THE ATTORNEY-GENERAL v. BURTON PERSSE.

(2 Dr. & War. 67—69.)

P. P. by his will, of the 4th of June, 1812, devised a rent-charge as a salary for a schoolmaster, to be appointed by the owner, for the time being, of the estate, on which the rent was charged. A schoolmaster was never appointed. In 1839, an information was filed to carry the said trust into execution :

Held, that the Statute of Limitations could not run, until a schoolmaster was appointed.

PARSONS PERSSE, by his will, dated the 4th of June, 1812, having devised the lands of Ballinruane to Robert Parsons Persse (whom he also appointed his executor), for life, remainder to Burton

1842.  
Jan. 21.

SIR EDWARD  
BUGDEN,  
L.C.

[ 67 ]



A.-G.  
PERSSE.

Persse, the elder, for life, remainder to Burton Persse, the younger, in tail, after various other devises and bequests, gave as follows: "I give and bequeath to my said executor, the sum of 50*l.*, which I direct he shall expend in building a school-house on the lands of Merton, in the county of Galway, for the poor children of the tenants on my estates in the county of Galway. And I hereby charge and incumber for ever the town and lands of Ballinruane aforesaid, with an annuity or yearly rent-charge of 25*l.*, to be paid thereout as an annual salary to a schoolmaster for said school, and which schoolmaster shall be in the nomination of such person as shall, from time to time, be in the seisin and possession of my estates in the county of Galway, with a power to said schoolmaster, at all times hereafter, whenever the said yearly salary of 25*l.* shall be behind or unpaid, to enter upon the said lands of Ballinruane, and distrain for the same, as usual in cases of rent-charges."

[\*68]

The testator died a few days after the execution of this will; but since his death no steps were ever taken to effectuate the trusts of the bequest above stated; no school-house was built; no schoolmaster was appointed; and, consequently, \*no payments were ever made upon foot of the annuity of 25*l.* per annum. However, the facts of the case having been communicated to the relators, and Robert Parsons Persse having died, in the month of October, 1829, the present information was filed against the tenant for life, and the first tenant in tail of the lands, upon which the said annuity was charged. The information prayed, that the trusts of the said will should be carried into execution, and that an account might be taken upon foot of the said rent-charge.

On the hearing of the cause an objection was taken, that the suit was defective for want of parties, inasmuch as a personal representative of the testator was not before the Court; but the objection was overruled.

The *Attorney-General*, the *Solicitor-General*, and *Mr. Radcliff*. for the information.

*Mr. Monahan*, and *Mr. P. J. Blake*, for the defendants, referred to *Cherry v. Mott* (1), and *James v. Salter* (2).

THE LORD CHANCELLOR :

The only question in this cause relates to the recent Statute of

(1) 43 R. B. 156 (1 My. & Cr. 123). (2) 43 R. B. 741 (2 Bing. N. C. 503, 3 Bing. N. C. 344).

**Limitations.** Whenever a case comes before me, in which there has been an actual gift to trustees for a charitable purpose, and the question arises, whether the claim of the trustee for such charity is barred by this statute, I shall not take upon myself the responsibility of deciding it, but will send it, as a mere legal question, to a court of law. But this case does not involve the determination of \*any such question, for here, in point of fact, no person could take this annuity, until an appointment of a schoolmaster was made, and no schoolmaster has ever been appointed. How, then, could time run under the statute? It is impossible to hold that it could run against the demand of a non-existing person. The charge is of itself a trust, like the common and ordinary case of a charge of debts, which, in the view of this Court, creates a trust for their payment; here there was no person entitled to receive this annuity; other poor children are now entitled to the benefit of this trust, and, therefore, without touching the general question, I apprehend this case does not fall within the statute, and I beg to be distinctly understood as not expressing any opinion upon the general question. The difficulty which may arise under the statute appears to me to be this, that whilst in former Acts, the Legislature never attempted to deal with cases of trusts, but left them to be disposed of by this Court on equitable principles, in analogy to proceedings in the courts of law, and this Court thought that charities could not be affected by the lapse of time, except in the case of a purchaser for valuable consideration without notice; in the recent Act it has taken upon itself to deal with trusts, and to fix a period of limitation in such cases; and consequently, as a charity is a trust, a serious question may arise, as to what the effect of the statute is upon charitable trusts (1).

By the decree an account was directed from the month of October, 1829, the period of the death of Robert Parsons Persse.—Reg. Lib. 85, 1842, fol. 374.

A.-G.  
v.  
PERSSE.

[ \*69 ]

### GERVAIS v. EDWARDS (2).

(2 Dr. & War. 80—85; S. C. 1 Con. & L. 242.)

This Court will not interfere to compel the specific performance of an agreement, unless it can itself at the same time execute the whole contract in the terms specifically agreed upon in favour of the defendant.

Accordingly, where a bill prayed the specific performance of a contract,

(1) See footnote to *The Incorporated Society v. Richards*, 58 R. B. at p. 276. (2) *Blackett v. Bates* (1865) L. R. 1 Ch. 117, 35 L. J. Ch. 324.

—O. A. S.

1842.  
Jan. 29.

SIR EDWARD  
SUGDEN,  
L.C.

[ 80 ]

GERVAIS  
v.  
EDWARDS.

one of the terms of which was to the effect, that if any damage should result to the defendant from certain works, the erection of which had been agreed upon between the parties, the plaintiff would give to the defendant an equivalent in land, the amount of the damage, and the quantity of the compensatory land to be ascertained by certain arbitrators: Held, that the Court had not jurisdiction to grant such relief; and that the execution of a deed, containing covenants for the performance of that part of the contract, which lay *in fieri*, would not be a specific performance.

THE bill stated, that at the time of the execution of certain written articles of agreement thereafter mentioned, the plaintiff and defendant were possessed of estates in the county of Tyrone, separated by a stream, which frequently during wet seasons overflowed its banks, to the injury of the said lands; that the defendant proposed to the plaintiff that they should join in some measure for the remedy of this evil; and that with this view, in the month of July, 1838, a written agreement, consisting of eleven articles, was entered into between the said parties.

By those articles (which were set out *verbatim* in the bill) it was stipulated, that the course of the stream should be changed; that, as the effect of making the new channel would be to cut off portions from the estates of both parties, exchanges of land should be respectively made, and that a certain mill-dam should be erected; and arbitrators were named for the purpose of carrying into effect the arrangement. The fifth clause of the agreement provided, that, in case at the end of twelve months from the making of a certain cut, it should be found to answer the purposes for which it was designed, then the defendant should contribute one-half of the expense of making the said cut. The sixth article was in the words following; viz.

[ \*81 ] “That if any damage arise to the lands of said Hugh Gore Edwards, Esq., above said dam, from the erection thereof, the said Rev. Francis Gervais shall give an equivalent \*in land in the upper part of said ‘give and take’ to the said Hugh Gore Edwards, as compensation for such damage; and which damage, if any, the arbitrators shall fix at the time of adjusting the other matters herein, and also lay off the quantity of land to be given by said Rev. Francis Gervais, in lieu of said damage, if any.”

The terms of the agreement were, in all other respects, immaterial to the question in the cause.

The arbitrators accordingly proceeded in the discharge of their office, and on the 12th of September, 1838, made their award; but the defendant conceiving that their award was unfavourable to him, declined to comply with or submit to its terms. This refusal

on the part of the defendant occasioned the present suit, and the plaintiff having, by his bill, waived all right of contribution under the fifth article of the agreement, prayed generally, that the defendant might be decreed specifically to execute the said proposal and agreement, he undertaking performance on his part.

GERVAIS  
v.  
EDWARDS.

*Mr. Serjt. Warren, Mr. T. B. C. Smith, Mr. Brooke, and Mr. Shiel, for the plaintiff.*

*The Attorney-General, Mr. Litton, and Mr. James Doherty, for the defendant :*

It would be impossible to execute these articles *in toto* ; they are unintelligible and uncertain. The Court cannot execute an agreement like the present, of an executory character, providing for matters, which are continually altering, *Buxton v. Lister* (1) ; in which case Lord HARDWICKE says, \**“ Nothing is more established in this Court, than that every agreement of this kind ought to be certain, fair, and just in all its parts.”* But, besides this, the Court will not enforce a contract, when one party cannot perform his part of it: *Harnett v. Yielding* (2).

[ \*82 ]

*Mr. Brooke, in reply :*

It is true, the defendant says he has a great objection to perform this contract ; but he does not state that the execution would be impossible, nor is the fact so ; the sixth article, upon which the entire difficulty turns, is not prospective ; it has reference, no doubt, to a calculation to be made ; but it is, in effect, an agreement for an exchange, and may be carried out by a deed, with proper covenants. In *Buxton v. Lister*, the bill was dismissed on the ground of misrepresentation. *Davis v. Hone* (3) shows that the Court will execute an agreement according to a conscientious modification of it, as far as circumstances will permit. No difficulty can ensue from its being an award, the specific performance of which is sought: *Wood v. Griffith* (4).

THE LORD CHANCELLOR :

If the jurisdiction of this Court permitted it, I should willingly grant a specific performance of this agreement, because the merits are altogether on the side of the plaintiff ; but I do not see how it is possible specifically to execute this contract. The Court acts

(1) 3 Atk. 383.

(3) 9 R. R. 89 (2 Sch. & Lef. 341).

(2) 9 R. R. 98 (2 Sch. & Lef. 549).

(4) 18 R. R. 18 (1 Swanst. 43).

GERVAIS  
v.  
EDWARDS.  
[ \*83 ]

only, when it can perform the very thing, in the terms specifically agreed upon ; but \*when we come to the execution of a contract, depending upon many particulars, and upon uncertain events, the Court must see, whether it can be specifically executed ; nothing can be left to depend upon chance ; the Court must itself execute the whole contract. There are cases where some of the acts to be done, consequent on the specific execution of the contract, may be performed subsequently. Thus a contract for sale of timber can be specifically executed, although the timber is to be cut down at a future time or at intervals, and the money to be paid by instalments. It is a certain contract, and the manner of dealing with the thing sold, by future cuttings, is no objection to a specific performance. The one man sells the timber, and the other pays for it the price contracted for. Here part of this contract is at once capable of a specific execution ; this admits of no doubt.

[ \*84 ]

But, then, by the rule of the Court, if I am called upon to execute the contract, I must myself specifically execute every portion of it ; I cannot give a partial execution of the contract. The plaintiff was perfectly aware of the difficulties arising out of the contract, and he accordingly, by his bill, waived his right to compensation, by way of payment of half the expenses from Mr. Edwards of making a certain cut, pursuant to the terms of the fifth article ; that part of the contract being one which the Court could not specifically execute ; but he was not enabled to remove what is the real difficulty arising from the sixth clause, because that contains a stipulation, not for the benefit of the plaintiff, but for the advantage of the defendant, and which the plaintiff could not waive. That important stipulation I cannot disregard. It is said, this is in effect an exchange (which I think it is), and that it may be carried out by a \*deed, and that there may be covenants to execute that portion of it, which is to be performed hereafter. There is no authority in support of this ; nor is the difficulty removed, by saying that a deed may be executed to carry out the contract. If a man agree to do a certain act ; for example, to dispose of an estate, with a covenant for something to be done hereafter, the Court can carry such a contract into specific execution. The decree would give all that was presently contracted for : the immediate transfer of the estate itself, and compel the party to enter into the covenant to do the particular thing. But here there is an entire contract, which must be executed. Certain things were to be done at once, and certain other things were dependent

GERVAIS  
f.  
EDWARDS

upon future contingencies. The plaintiff has waived his right, as far as he could. But by another clause (1) it is provided, that if any damage should arise to the lands of Mr. Edwards, from the erection of the dam, the plaintiff should give an equivalent in land as a compensation for such damage; which damage the arbitrators were to fix at the time of adjusting the other matters, and also lay off the quantity of land to be given in lieu of such damage.

It is said, that this operates either *in presenti*, and has been executed by the award, or that the agreement, in this respect, might form a part of the deed. I am clearly of opinion, that this is not a matter to be presently ascertained, but is dependent upon the operation of works contracted to be erected, and can only be ascertained, after the works have been in operation. The provision was to guard against the probable chance of future damage to the defendant's land; no evidence has been read, to show that it \*formed any part of the award, or that the arbitrators took it into their consideration; and the language of the award does not imply that they did. Well, then, it is a prospective measure, and what is the decree to be? It cannot be made the subject of covenant; that is not the agreement of the parties. Am I to decree the specific performance of that, which is now capable of being executed? and then (for I must go on) am I to decree, that if hereafter, when the works, not now commenced, are completed, damage should arise to the defendant's land, the arbitrators shall ascertain the damage, and the plaintiff shall convey land, equivalent in value to such damage? No one ever heard of such a decree. If the case should ever arise of damage, it would, I dare say, lead to a new bill being filed, new witnesses, new questions as to the extent of the damage sustained, and whether the arbitrators acted fairly, and had valued the property correctly. It is impossible to execute this contract specifically. No precedent has been cited on either side, and indeed it was scarcely worth while searching for precedents, as the question is one of principle; but the authorities upon the right of the Court to compel the execution of a contract, where the price is to be fixed by arbitrators, will show, how many difficulties the Court would have to struggle with in this case. I am, however, so little satisfied with the conduct of the defendant, in his attempt to evade the contract, that, although I must dismiss the bill, I shall do so without costs.

[ \*85 ]

(1) Sixth clause.

1842.

Feb. 2, 3, 4.

SIR EDWARD  
SUGDEN,  
L.C.

On Appeal.

Lord  
BROUGHAM,  
L.C.Lord  
COTTENHAM.Lord  
CAMPBELL.

[ 89 ]

## HERON v. STOKES (1).

(2 Dr. & War. 89—115; S. C. 1 Con. & L. 270; in part reversed on appeal by the House of Lords, as reported under the title of *Stokes v. Heron*, in 12 Cl. & Fin. 161—203.)

W. H., by his will, which was not attested, so as to pass real estate—directed that his property should produce for his wife an annuity of 100*l.*: for each of his daughters M. and J. L. 100*l.* per annum, for themselves and their children; for his wife's mother 100*l.* per annum: the annuities given to his wife and her mother, after the death of the survivor, to go to his three children W., M. and J. L., in equal shares. The testator bequeathed the residue of his property to W. Subsequently M. died, and by a codicil the testator directed the 100*l.* per annum, &c., provided for M., to be equally divided between W. and J. L.: by a second codicil, W. H. directed that, in the event of W.'s death, without issue male, then after the decease of his (the testator's) wife and J. L., his remaining property should go over. J. L. had no children at the date of the will, or at the time of the testator's death, nor did she take any other benefit under the will and codicils than those mentioned: Held by the House of Lords on appeal (reversing the decision of the LORD CHANCELLOR), that J. L. took perpetual annuities.

Where an annuity is bequeathed without words of limitation, and unaccompanied by a reference to some fund for its payment, the legatee will not take more than a life interest.

W. H., by a codicil to his will, directed certain property to be equally divided between his sister A. and her daughters, and his sister-in-law C. and her children: Held, that the property was to be distributed *per capita*, and not *per stirpes*. There was no appeal upon this point.

By a marriage settlement, lands were settled upon the husband for life with remainder to the issue of the marriage, in such shares, &c., as the husband should by will appoint, and in default of such appointment to the issue, share and share alike: Held, that the several children of the marriage, as they respectively came *in esse*, took immediate vested interests in the lands, liable to be divested by the husband's exercise of his power of appointment. There was no appeal upon this point.

By indenture dated 26th of May, 1798 (being the settlement executed upon the intermarriage of William Heron, the testator in this cause, with Mary Darby), certain freehold and leasehold interests were vested in trustees, upon trust, after the determination of a life estate given to William Heron, and of certain other uses (since determined), “for the sole use and benefit of the issue male and female of said intended marriage, in such manner and form, shares and proportions, as the said William Heron shall, by his last will and testament in writing, duly attested by three credible subscribing witnesses, order and direct; and for want of such will, to the use and behoof of such issue, equally share and share alike; and in case the said William Heron shall die without issue in the life-time of his said intended wife, then, and in such case, upon

(1) *Bent v. Cullen* (1871) L. R. 6 Ch. 235, 40 L. J. Ch. 250; *Evans v. Walker* (1876) 3 Ch. D. 211; *In re Morgan* [1893] 3 Ch. 222, 62 L. J. Ch. 789.

**trust**, and to and for the sole and only use of the said Mary Darby, **her heirs**, executors, administrators, and assigns for ever."

HERON  
v.  
STOKES.  
[ 90 ]

On the 8th of June, 1815, William Heron made his will, which was **not** attested by subscribing witnesses, in the words following, that **is to say**: "My will is, whatever I die possessed of, or in any way **entitled** to, together with whatever property my wife may be in any **way** entitled to, shall produce to my wife an annuity of 100*l.*; to **each** of my daughters, 100*l.* per annum, for themselves and their **children**; to my wife's mother, in addition to any property she **may** possess, so as to make up to her an annuity during her life, of 100*l.* per annum; said annuities, after the decease of my wife, **and** her mother, to be equally divided among my three children, William, Mary, and Julia Louisa; but my will is, that my wife and **her** mother shall enjoy their annuities as above, for their lives, **and** the life of the survivor of them, so that the survivor shall possess an annuity of 200*l.*, to be, after the decease of both, equally divided between my three children; all the rest and residue of my property I give and bequeath to my son William; whatever ready money or furniture I may die possessed of, I give and bequeath to my wife, to be by her managed for the joint benefit of my three children, herself, and her mother. And to my wife Mary, and my brother Augustus, I leave the execution of this my will."

On the 24th of May, 1817, the testator made a codicil to his said will, in these words: "It having pleased Almighty God to take away my daughter Mary, it becomes necessary to alter the disposition of my property after my decease, so far as relates to her; I therefore now declare it to be my will, and hereby direct, that the 100*l.* per annum, &c., provided, as within directed, for my daughter Mary, shall be divided equally between my son, William, and my \*daughter, Julia Louisa, and that my will, as within expressed, shall remain in all other respects unaltered."

[ \*91 ]

On the 4th of July, 1829, the testator added a second codicil: "And in case my son, William, shall die without leaving issue male, lawfully begotten, my will is, that after the decease of my wife, Mary, and my daughter, Julia Louisa, my remaining property shall then be equally divided between my sister, Anne Owen, and any daughters by George Taylor Owen (her present husband), she may have then living, and my sister-in-law, Charlotte Heron, widow of my late brother, Edward, and any children she may have by my late brother, Edward, then living, share and share alike."



HERON  
v.  
STOKES.

On the 29th of July, 1829, the testator executed a third codicil, in the words following: "If, under any circumstances, the whole of the property I leave, shall fail to produce to my son, William, an annuity equivalent to that bequeathed to my daughter, Julia Louisa, viz., 150*l.* per annum, it is my will, that the actual amount of income, whatever it may be, shall then be divided into ten equal parts, four of which parts shall be paid to my wife, Mary, and three to my daughter, Julia Louisa, and the remaining three parts to my son, William. This arrangement to continue, until the income shall afford the full annuities of 200*l.* to my wife, Mary, 150*l.* per annum to my daughter, Julia Louisa, and at least 150*l.* per year to my son, William."

[ \*92 ]

None of these codicils were attested, so as to pass real estates, or in the manner directed by the power contained in the settlement of May, 1798. The testator died on the 8th of October, 1831, leaving Mary Heron, his widow, and two \*children, William Heron, the younger, his heir-at-law, and Julia Louisa Heron, his daughter, him surviving. There were seven other children of the marriage, all of whom died in the life-time of the testator, six of them under age, and one daughter, Mary Heron, who, having attained her age of twenty-one years, died intestate, and unmarried. William Heron, the younger, died on the 28th of November, 1832, intestate, unmarried, and without issue. Julia Louisa Heron married John Stokes, some time in the year 1831, and by the settlement executed upon that occasion, all her property was vested in trustees, for the use of John Stokes, Julia Louisa Heron, and their issue. There was issue of that marriage, an only daughter, Louisa Stokes. Anne Owen, the sister of the testator, died in July, 1832, leaving two daughters by her husband, George Taylor Owen, her surviving. Charlotte Heron, the testator's sister-in-law, had seven children, who were all living at the time of his death.

Under these circumstances, doubts having arisen as to the construction of the will and codicils of the testator, a bill was filed by Charlotte Heron, and her children, and the two daughters of Anne Owen, on the 12th of December, 1833, to ascertain the rights of all parties claiming under them, and for an account of the personal estate of the testator. To this bill, Mary Heron, the widow, and executrix of the testator, together with John, Julia Louisa, and Louisa Stokes, and George Taylor Owen, who had obtained letters of administration to his wife, Anne Owen, were made defendants.

Julia Louisa Stokes died on the 14th of October, 1834, and Mary Heron on the 18th of the same month; the \*testator's mother-in-law died in the life-time of his widow; and the cause having been revived against the proper parties, came on to be heard on the 25th of January, 1837, when, by a decretal order of that date, it was referred to the Master to take the usual accounts.

HERON  
v.  
STOKES.  
[ \*93 ]

On the 24th of December, 1840, the Master made his report, and thereby, after finding the several facts above-mentioned, reported three special points for the decision of the Court; viz.:

First.—Whether upon the construction of the said will and codicils, the annuities of 150*l.*, and 100*l.* a year, bequeathed to Julia Louisa Stokes, were perpetual annuities, or were given to her for her life only.

Secondly.—Whether the residuary property of the testator, subject to the said annuities, was divisible into two equal shares, one moiety to be subdivided between Charlotte Heron, and her children, and the other moiety between the personal representative of Anne Owen, and her two daughters; or whether it was not to be generally divided in equal shares amongst Anne Owen, and her two daughters, and Charlotte Heron, and her children.

Thirdly.—Whether, under the settlement of 1798, all the children of William and Mary Heron took vested interests in the leasehold property, which was the subject of that settlement, upon their birth, transmissible to their representatives, the testator having died without exercising his power of appointment.

The cause was heard upon this report, and for further \*directions, on the 25th of January, 1841, and by the decree pronounced by Lord Chancellor PLUNKET, on the 2nd of February, it was declared, that the several annuities, amounting in all to 250*l.* per annum, bequeathed to Julia Louisa Heron, were perpetual annuities; that Charlotte Heron, and her children, were entitled to one moiety of the surplus of the personal estate of the said testator, in equal shares; and the defendants, George Taylor Owen (as administrator of Anne Owen), and their children, entitled to the other moiety of said surplus, in equal shares; and it was further declared, that the leasehold premises, the subject of the settlement of the 26th of May, 1798, vested in such of the children of William Heron, as were living at the time of his death.

[ \*94 ]

With this decree the plaintiffs being dissatisfied, presented their petition of rehearing, and the cause now came on to be reheard.

HERON  
v.  
STOKES.

The Attorney-General, Mr. T. B. C. Smith, and Mr. Gayer, for the plaintiffs :

The first special point in this case, viz., the duration of the annuities given to Julia Louisa Stokes, was decided, in favour of the defendant Stokes, expressly upon the supposed authority of *Wild's* case (1) ; but the rule in that case has never been extended to personal estate ; and the case of *Buffar v. Bradford* (2) is an authority against such an extension. \* \* \*

[ 95 ] The next question relates to the distribution of the residue. Upon this point the plaintiffs also complain of the decree ; for, how can the words of the second codicil be satisfied, by the construction, which apportions the gift *per stirpes* ; the expression, “share and share alike,” is not confined to one member of the sentence. *Blackler v. Webb* (3), and *Eccard v. Brooke* (4), are conclusive upon this point.

The only remaining question arises on the construction of the settlement of 1798 ; it appears perfectly settled by authority, that all the children took vested interests, as they came *in esse*, liable to be divested, by an exercise of his power of appointment by William Heron. \* \* \*

Mr. Serjt. Warren, Mr. Keatinge, and Mr. Stirling, for the defendants, John and Louisa Stokes :

By the decree now complained of, we have been declared entitled to an annuity of 250*l.* *in perpetuum*. *Wild's* case appears to govern the gift in the will. The ground of the decision in *Buffar v. Bradford* was not the circumstance that the subject-matter of the bequest there was personal estate, but the birth of a child in the life-time of the testator. \* \* \*

[ 96 ] Upon the construction of the settlement it may be observed, that in the cases cited on the other side, the word used was “children,” not “issue.” The clause which immediately follows, “share and share alike,” shows the intent of the parties, and yet, according to their construction, if \*the husband died in the life-time of his wife, having had children who died in his life-time, the wife could not take anything. So, if a child died in the life-time of his father intestate, having children, those children could not take.

(1) 6 Co. Rep. 16 b.

(2) 2 Atk. 220.

(3) 2 P. Wms. 383.

(4) 2 R. R. 31 (2 Cox, 213).

Mr. Serjt. Greene, Mr. Pigot, and Mr. F. Goold, for the defendants, George Taylor Owen, and his children :

HERON  
F.  
STOKES.

We contend that the surplus should be divided into moieties, and each moiety subdivided. The words of the will in *Robinson v. Waddelow* (1), in language, most nearly resemble those in the principal case : *Richardson v. Spragg* (2). In *Eccard v. Brooke* the expression was not, as here, “between,” which properly denotes two objects of division, but “unto and amongst,” which points at a plurality. The dash, which in the original will separates the two clauses of the codicil, also favours this construction.

Mr. T. B. C. Smith, in reply :

\* \* As to the question of the mode, in which the surplus should be distributed, the words “equally between” were the very words in *Barnes v. Patch* (3). *Butler v. Stratton* (4), (the marginal note of which is inaccurate), *Lady Lincoln v. Pelham* (5), and *Elmsley v. Young* (6), were also referred to.

[ 98 ]

THE LORD CHANCELLOR :

Feb. 3.

I feel considerable difficulty in this case, with regard to the perpetuity of the annuities bequeathed to the testator's daughter ; but, upon the other points which have been argued, I do not entertain any doubt.

As to the principle, upon which the property given in the second codicil is to be distributed, whether *per capita* or *per stirpes*, it is quite settled by authority, that the division must be made on the former. The defendants here, the Owens, who have raised the question, are anxious for a distribution, partly *per capita*, and partly *per stirpes*. If they could get into possession of the fund on the latter principle, they would then consider the former a very good doctrine for the ultimate distribution ; but the case of *Eccard v. Brooke* (7), with many others, is quite clear upon the subject. As to the dash, by which the two classes were separated in the codicil, it is impossible for the Court to attach any weight to the circumstance. In wills and deeds you do not ordinarily find any stops ; but the Court reads them as if they were properly punctuated. The testator here, indeed, \*seems to have been in the habit of introducing dashes into his writing ; I find several in this very codicil.

[ \*99 ]

(1) 42 R. R. 138 (8 Sim. 134).

(5) 7 R. R. 370 (10 Ves. 166).

(2) 1 P. Wms. 434.

(6) 39 R. R. 146, 353 (2 My. & K.

(3) 7 R. R. 127 (8 Ves. 604).

82, 780).

(4) 3 Br. C. C. 367.

(7) 2 R. R. 31 (2 Cox, 213).

HERON  
v.  
STOKES.

As to the construction of the settlement, there appears to have been some misconception, arising from the circumstance that the power was confined to an appointment to be made by will, and could not have been exercised by deed; nothing, however, is better settled, than that if, in a settlement, there is contained a power of appointment to a class, and in default of appointment, the estates are given over, the existence of the power does not prevent the vesting of the gifts, and the construction is, that those persons, to whom the estate is limited, take vested interests, liable to be divested by an exercise of the power of appointment. In the present case the Court appears to have thought, that as the exercise of the power was confined to a will, none could be objects of the power, but those who survived the testator; and that, therefore, the gift over must be confined to those, who could take under the power. But, though a will, under a power of appointment by will, in every respect resembles any other testamentary disposition—it is for instance subject to the same rules, with respect to lapse—yet the gift here in default of appointment, was not intended to be liable to the same accident; it takes in all the persons, in whose favour an appointment might at any time be made. Nobody can predicate, to whom such an appointment may be made; but the gift over includes all, and must be taken to be a vested interest, until the appointment takes place.

[ \*100 ] There had been much controversy on this subject; but it was clearly settled by the cases of *Cunningham v. Moody* (1), \*and *Doc v. Martin* (2), that the power of appointment does not suspend the vesting, and that estates, limited in default of appointment, are vested, subject to be divested by the exercise of the power. The distinction taken in this case, and resting on the power of appointment being confined to a testamentary disposition, cannot be sustained. *Vanderzee v. Aclom* (3) is precise on the point. I myself never had any doubt on the doctrine; I must, therefore, reverse this part of the decree.

[His Lordship reserved the question as to the perpetuity of the annuities until he had given it further consideration; but he made the following observations upon the case of *Blewitt v. Roberts* (4):]

[ 101 ] In the case of *Blewitt v. Roberts*, lately before the Vice-

(1) 1 Ves. Sen. 174.

(2) 4 T. B. 39.

(3) 4 Ves. 771.

(4) 54 R. B. 291 (Cr. & Ph. 274; 10 Sim. 491).

HERON  
v.  
STOKES.  
[ \*102 ]

Chancellor of England, in which his decision was reversed \*by Lord COTTENHAM (1), the gifts were of annuities, without reference to any particular fund for their payment; the LORD CHANCELLOR held the annuities confined to the lives of the annuitants, but as some of those annuitants had the power of leaving the annuities to their wives or children, I should consider, that as to them, there was much greater difficulty in Lord COTTENHAM's construction of that will, than there is in my holding in this case, that these gifts must be confined to life interests.

[His Lordship delivered judgment, upon the point thus reserved, on the following day, and made some further observations upon the case of *Blewitt v. Roberts*, saying :]

There the gift was not made with reference to any fund ; in the other cases, which I have mentioned, the gift was either out of a fund, or of the produce of a fund ; in all, where the bequest was held without words of limitation to pass a perpetuity, the gift was in some manner coupled with a specified fund. But in *Blewitt v. Roberts*, the VICE-CHANCELLOR did not follow those cases. He has long entertained the opinion, that a gift of an annuity passes the absolute interest without words of limitation ; and in *Blewitt v. Roberts*, he acted upon that opinion. My own opinion, following, I believe, the authorities, has always been, that where the gift is made with reference to a particular fund, the pointing to the fund is such an indication of intention, as amounts to a dedication of so much as will absolutely purchase the annuity, whilst, in the case of gifts made *simpliciter*, no such indication exists. In the case referred to, there were two classes of gifts of different natures ; the testator first gave his wife 600*l.* per annum, for her life, and directed, “after her death, the said annuity to be equally divided between Ann Rogers Blewitt, Thomas R. Blewitt, &c., or the survivors or survivor ;” the VICE-CHANCELLOR held, that this passed a perpetuity, but on appeal, his decision was reversed by Lord COTTENHAM, and I must say, that in my opinion, Lord COTTENHAM was right ; for the gift was of a mere naked annuity, without reference to any particular fund, and therefore fell within the rule in *Savery v. Dyer*. But the next bequest involved a little more difficulty : “I also give to each of them, the said Ann Rogers Blewitt, &c., 100*l.* per annum, during their lives, to be paid

[ 109 ]

(1) 54 R. R. 291 (1 Cr. & Ph. 274, reversing 10 Sim. 491).

HERON  
 \*  
 STOKES.  
 [\*110]

quarterly, with power to leave their said respective annuities, at their deaths, to any person they may \*marry, or any child or children they may leave; but in case of any of them dying, without exercising such power, then to the survivors or survivor." Of course, the VICE-CHANCELLOR held this gift perpetual, but upon this point also, his decision was reversed by the LORD CHANCELLOR, who held, that these annuities of 100*l.*, vested in the several legatees for their respective lives, with power to appoint them to their wives or children for their lives, and that in default of appointment, on the decease of any annuitant, his annuity vested in the survivors, for their respective lives. I confess, I do not go along with Lord COTTENHAM, in his view of this clause. I do not see how it can be maintained; although it was the case of a naked annuity, yet, that the testator intended to create a perpetuity, was, in my opinion, clearly manifested by his giving the legatees power to leave it to their wives or children, looking to a succession of takers. But, although I cannot agree with the result of the case on this point, it shows the strong disinclination of the Courts at present, to extend, beyond the life of the legatee, a gift of an annuity, without words of limitation; and that they have restored the old, and, I believe, the true rule, that where an annuity is bequeathed, without words of limitation, and unaccompanied by a reference to some fund for its payment, the legatee will not take more than a life interest.

[\*111]

If there was nothing more in the case than what I have stated, I should have been strongly inclined to think, that the eldest daughter, Julia Louisa, took absolute interests in the gifts to her. There is nothing given in the codicils, but what had been disposed of by the will; the testator speaks of *the* annuities. Now, the will commences with a direction, that his property shall produce the annuities, consequently, \*all the annuities, all the gifts, whether expressed in the will itself, or in the codicils, were to come out of that property; and, therefore, if I rested on these considerations, I should, according to the distinctions which I have stated, hold these bequests to Julia Louisa absolute.

But then, a difficulty arises upon the second codicil, which I feel it is impossible to get over. "If William shall die without leaving issue male, lawfully begotten, my will is, that after the decease of my wife, Mary, and my daughter, Julia Louisa, my remaining property shall be equally divided, &c." Nothing is more clear than, that as regards the wife only, these words were properly introduced,

HERON  
v.  
STOKES.

she was expressly tenant for life. Then, on a certain contingency (not perhaps a very wise one), he gives over the property from his son's daughters, to his sister-in-law, and her children; but not, he says, until after the deaths of my wife and daughter. In order to give the daughter more than a life interest, I must look for an intention to pass more. As there are no words of limitation, I must collect the intention according to the rule of law, and the words, "after her decease," plainly import a life interest in Julia Louisa. It is a singular thing, that the testator never mentions the children of his daughters, after the first direction with respect to them, contained in the will. Now, when it is certain that the wife took only a life interest, and it is doubtful whether the daughters would take more than a life interest under the will, and (nobody being interested but the son, wife, and daughter), the testator then says, "if my son die without issue male, and after my wife and daughter are removed by death, I give the property over to collateral relations," what construction can I put upon this, but that his direction is an expression of what went before, and that \*he meant to give only a life interest to his daughter. I have read these words over and over again, and have anxiously struggled with them, to see if it were possible for me to construe them, so as to enable me to give an annuity in perpetuity, but I have found it impossible to get over their force; I must, therefore, reverse the decree upon this point.

[ \*112 ]

The next question, and upon which I, on a former occasion, expressed my opinion, is as to the effect of the gift in the conclusion of this codicil, whether the legatees take *per capita*, or *per stirpes*; the point is really surrounded by authorities, and not open to any doubt. The words of the bequest are, "my remaining property shall then be equally divided between my sister, Anne Owen, and any daughters by George Taylor Owen (her present husband), she may have then living, and my sister-in-law, Charlotte Heron, and any children she may have by my late brother, Edward, then living, share and share alike." Here is great capriciousness, for the testator [not] only provides for the daughters of his sister, but for the children generally of his sister-in-law. Looking at the two stocks, I think that, morally speaking, the probable intention was to provide for them according to each stock, and that the testator meant to give one moiety of the property to Anne, and her daughters, and the other moiety to Charlotte, and her children; and certainly, the words rather favour



HERON  
v.  
STOKES.

this construction, for the expression, "equally between," is in strictness applicable only to two; but it must be admitted, that both in their wills, and in common parlance, men speak of equal divisions between their children, how numerous soever those children may be; "to and amongst" is more accurate, and is the expression used by conveyancers. The rule of law, is, however, quite \*clear.

[ \*113 ]

[His Lordship then referred to the various cases which had been cited in argument upon this point, and concluded his judgment upon this point as follows:] In this case I do not entertain the slightest doubt the question is perfectly settled by authority, I must, therefore, reverse the decree upon this point, and declare that the parties take *per capita*.

[ 115 ]

The only other question was, that which was raised upon the construction of the settlement, and which I disposed of yesterday. It is clear upon authority, that the children took vested interests, liable to be divested by an execution of the power. On this part of the case I have only to add, in reply to an observation which was made at the Bar, namely—that the circumstance of the gift over showed an indication of intention on the part of the settlor that the interests should not be considered as vested,—that the rule is settled, that no gift over upon a contingency can prevent the previous estate limited from vesting. If the contingency happens, the prior vested estate will be divested.

The LORD CHANCELLOR offered to hear *Mr. Serjt. Warren* again upon the extent of interest taken by the annuitants, if he thought he could shake his opinion, but the offer was declined.

[An appeal was presented from so much of the decree as reversed the decision of Lord Chancellor PLUNKET, with reference to the duration of the annuity taken by Julia Louisa Heron. The appeal is reported under the title of *Stokes v. Heron*, in 12 Cl. & Fin. 161.]

1845.

*Mr. Kindersley* and *Mr. Bethell*, for the appellant.

[ 12 Cl. & Fin.  
165 ]

The *Solicitor-General* (*Sir F. Thesiger*) and *Mr. Glasse*, for the respondents.

[ 172 ]

[ 176 ]

*Mr. Kindersley* replied.

LORD BROUGHAM, L. C. [after stating the case, and reviewing the authorities upon *Wild's* case and the opinions of Lord PLUNKET and Sir EDWARD SUGDEN upon the application of that case to personal estate, said :]

HERON  
v.  
STOKES.

For these reasons (1), therefore, I certainly agree with Lord Chancellor PLUNKET, that the rule in *Wild's* case of itself, is applicable to personalty ; and this is enough to support his decision as to the two daughters. But the terms of the will being sufficient, independent of the rule, to support the conclusion that, had the will stood alone, it would have given a perpetuity, and not a life interest, it becomes unnecessary for your Lordships to decide whether the rule in *Wild's* case applies to the present case or not. I have thought it my duty, from the sincere and unfeigned respect which I feel for that most eminent person Lord PLUNKET, to state that my opinion agrees with his. But I agree also with Sir EDWARD SUGDEN entirely, that even if the rule in *Wild's* case was out of the question, the words are sufficient in that which forms the constitution of the annuity,—the first words of the will,—to give a perpetuity of themselves.

[ 185 ]

Then, that being the case, we have made a very material step, and we have by means of that step put our foot upon a ground of great importance in disposing of the whole construction ; because our position amounts to this, that \*but for something in the codicil the whole would be clear ; and we have the concurrence of both learned Judges—conflicting upon the ultimate conclusion they arrived at after construing the codicils—differing in the route by which they came at this first or intermediate conclusion—we, nevertheless, have them agreeing in the proposition, that the will standing alone gives a perpetuity, and not a life interest.

[ \*186 ]

Then I take leave to make another step. My opinion is, that if you find the will so clear by itself, and the perpetuity so irrefragably established by that will, in order to restrict that perpetuity to a life estate—in order to alter the will—in order to revoke the gift of the perpetuity, the codicil must be found to be clear and unincumbered with doubt, because the will, standing clear and unincumbered with doubt, cannot otherwise be altered—cannot otherwise be revoked. The interest by the will given cannot be cut down to a

(1) As the application of the rule in *Wild's* case to personalty is now settled law, and as the decision of the House of Lords in *Stokes v. Heron* does not

really turn upon the rule in *Wild's* case, it is thought unnecessary to set forth these reasons in full.—O. A. S.

HERON  
v.  
STOKES.

life interest, unless by clear and undoubted matter in the codicil—"by indication plain," as was said by the Court in a celebrated case—"by indication plain" of a contrary intention to what prevailed at the time of making the will. There must appear clearly to have been in the mind of the testator, when he made the codicil, an intention opposite to that which he had when he made the will. For I am entitled to deny that the will is doubtful, when both those learned Judges, though upon different grounds, held it clear. Moreover, even if I admit that there is a doubt on the gift in the will, before I can hold the decision below to be right, I must see that the codicil quite clearly explains that doubt; otherwise we are still in the doubt the will left us in. But in truth no one says there is a doubt; all agree that, standing by itself, a perpetuity was constituted by the will; consequently the codicil must be undeniably sufficient to alter that original gift, and cut it down to a life interest, else the gift as originally made must stand. This is quite plain and undeniable.

[ 187 ]

We come now, therefore, to the codicil. He had given William his annuity and the residue by the will. Then, passing over the first codicil, you come to the second, upon which the decree below mainly rests. "And in case my son William shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife Mary and my daughter Julia Louisa, my remaining property shall then be equally divided between my sister Anne Owen and any daughters by George Taylor Owen, her present husband, she may have then living, and my sister-in-law Charlotte Heron." In short, he gives it away from his issue to his sisters. At first I thought there was very little in the argument, and that it savoured of refinement, which was raised upon the use of the word "and;" but upon further consideration I incline to go along with that view. I do not think it necessary for the case; but still I think it aids it. No doubt, having given a perpetuity in the will, if he meant to alter and revoke it, cutting a perpetuity down to a life interest, he would much more naturally, be he a learned or be he an unlearned maker of an instrument, have begun with any other word rather than the word "and;" for "and" means besides—in addition to—add this—not except this, or nevertheless, but add what is to follow; such is the use of the word in common parlance; it is, "and moreover," "over and above this," or "besides;" I mean to give something more. It savours much more of an intention to add to than to take away—to enlarge rather than to cut down—to extend rather than to contract what had been given

HERON  
v.  
STOKES.

before. If a man had given at first a large estate, and then meant to give a much less one—if, having first given an absolute interest he afterwards chose to make it an interest for life, he would be much more likely to say, “Whereas I have given so and so by my will, observe, I only now mean to give so much less.” I therefore think the observation \*upon the connecting word “and” aids the argument; I think that it was properly made.

[ \*188 ]

But, my Lords, the thing does not rest upon that, because it is not necessary to show—and it is not upon those who maintain the appellant’s contention in this case to show—that the codicil meant to add or meant to confirm what was given in the will; for unless the codicil revokes—unless the codicil retracts—unless the codicil alters the will, the will shall stand; that is perfectly clear. Now does it alter or retract? It seems to me the most forced construction that can be put upon it, the one which does the greatest possible violence to the words used, and to the manifest intention which they show forth, is to hold, as was done below, that this is an alteration or a revocation of the will, and changes the estate first given into a life estate. “After the decease of my wife, if my son William shall die without issue male lawfully begotten, and my daughter Julia Louisa shall also die, my remaining property shall be equally divided between my nieces.” Can any thing be conceived less likely than that a person, having given a perpetuity to provide for his own issue and their descendants, should all at once cut it down to a life interest, upon what event?—the death of one of the takers without issue male. Why was the death of William, with issue male or without issue male—above all things without issue male, which makes it still more inconceivable—why was that event to make an alteration in the gift already made to the others? The things are totally unconnected. One does not see any possibility of even coupling them, much less connecting them together; they are events foreign to each other; they are interests utterly unconnected one with another; and yet the construction is, that having given a perpetuity to A. and B., two of his children, he cuts that down to a life interest, because C., a third child, dies without leaving issue male. It is a \*thing perfectly unintelligible; and that seems to have struck the LORD CHANCELLOR, for in going over it he refers to it, and says, “then upon a certain contingency” (which he does not name, but it is plainly the one I have mentioned, namely, the son William dying without issue male)—“then upon a certain contingency, not perhaps a very wise one.” That is an error

[ \*189 ]

HERON  
 6.  
 STOKES.

of the reporter, because of a contingency you cannot predicate wisdom or foolishness; but it means not a very wisely considered contingency. His Lordship, in all probability, said, "upon the view of a certain contingency, not perhaps a very wise view;" and that is quite intelligible. No doubt he might very well say that, because it is very far from being a wise view, that I should give my two daughters a perpetuity, but declare that it shall be cut down to a life interest *in pœnam*, not of anything they shall do, but *in pœnam* of my son William, to whom I also give a perpetuity, dying without issue male. This is really so far from being wise, that it seems to be perfectly unintelligible. Now observe, the whole argument of the LORD CHANCELLOR OF IRELAND proceeds, and must of necessity proceed, upon the assumption, that "my remaining property" means one thing, and one thing only, namely, all that I have given, except what I have given William—all the rest of my estate already given; because nothing else will take it out of Julia Louisa and the other. Upon the death of my wife and Julia Louisa all my property shall be equally divided, including the residue, subject to their life interest and that which I have given by my will to the two daughters. If you can believe that the words "remaining property" mean "every thing beyond the life interest that I have given in my will"—if you can supply all those words, and say that he means thereby to give that excess to the collaterals, to the nephews and nieces—then you can understand that this revokes the grant in the will. But if you do not believe that, you do not advance a hair's \*breadth towards the conclusion at which the Court below arrived, namely, an alteration and revoking of the gift in the will. Moreover, you must be quite sure that such is the meaning, and that the words "my remaining property" can have none other; because the will is clear and you cannot revoke or alter it unless the codicil is a clear alteration. Sir E. SUGDEN considers "remaining property" to include, not merely the residue given to William, for whose death without issue male he was providing, but all that he had before given in the will to the other children beyond their life interest. How can the words "remaining property" possibly mean any such thing? How can words clearly residuary dispose of particular gifts made, and made before you have any right to talk of a residue at all? Can any thing be more clear than that, having given a residue to William, when he is providing for the event of William's decease, he disposes of that residue by the not inappropriate words "remaining property?"

[ \*190 ]

HERON  
v.  
STOKES.

My Lords, I ought to have mentioned, before I dismissed the consideration of *Wild's* case, that the rule (which nobody disputes, which Sir EDWARD SUGDEN expressly acknowledges himself, and which every lawyer must admit)—the rule that words which would give an estate tail in real property, if applied to personalty, give an absolute interest, has always gone upon the assumption that such words as are used in *Wild's* case, and such words as are used in this case, if they would convey an estate in realty, would pass an absolute interest in personalty. That is the common rule; it is admitted upon all hands to be an undeniable principle of law; none of the cases will ever be found to go against it, and Sir EDWARD SUGDEN himself admits it to be the law; yet this rule really appears to assume that *Wild's* case applies to personal as well as to real estate. I have here stepped aside merely to add that which I had omitted to mention in its right place; nor was it necessary to the argument.

But now there is the third codicil. It is needless to go into it further, because I am quite clearly of opinion, that unless the second codicil cuts down the perpetuity to a life estate which is given by the will, there is an end of the question, and the will must stand giving a perpetuity. But the third codicil appears to me materially to support the same conclusion. It appears to me to be quite clear, that the testator meant not to cut down what he had given, but to increase it. Upon the death of William without issue male, he gives over—not very rationally I admit—the part become vacant, from the daughters to the collaterals; but to carry that irrational provision one inch further than he carried it, and to add the absurdity of cutting down the perpetuity, which is given by the will, to a life interest on account of those words in the codicil, is, in my humble apprehension, a course utterly impossible for your Lordships to pursue.

[ 191 ]

My Lords, upon the whole, therefore, I am of opinion—and my high respect for both the learned Judges below is my reason for trespassing so long upon your Lordships' attention in giving that opinion—I am of opinion, upon the grounds which I have stated, that the codicils do not vary, except indeed they may be thought rather to extend, the gift of the will, and consequently that that gift is a perpetuity; that the decree of Lord PLUNKET being right, ought not to have been reversed upon re-hearing; and that, consequently, your Lordships ought to reverse the reversing decree, which will have the effect—and only the effect—of setting up the original decree in the cause.

HERON  
f.  
STOKES.

LORD COTTENHAM:

[ \*192 ]

Both Lord PLUNKET and Sir EDWARD SUGDEN were of opinion that the annuities are perpetuities. The different annuities, however, stand upon a somewhat different footing. The two annuities given to the daughters have the addition to them which raised the question in *Wild's* case; because the gift to them is to them "and \*their children." The gifts to the wife, and to the mother of the wife, are for life; but there are two grounds applicable to them all, which seem to me to leave no doubt as to all amounting to a perpetuity. Now those two grounds are, first, that which is relied on by Sir EDWARD SUGDEN, of this being a gift of property producing the amount of the annuity. The expression is, that his property shall produce three several sums. The other ground, which is equally effective for the purpose of showing that these annuities are to be considered in their extent as perpetuities, is that the testator deals with them as being in existence, and operative beyond the period of the lives of those who are first to enjoy them. Take the case of the daughters; the gift is of an annuity to themselves and their children, there being no children in existence. Now, in what way the law would operate so as to protect as far as possible the interests of the children might become a question; but it is quite obvious that the testator did not intend the extent of the gift so given to be limited to the lives of the daughters. Again, he gives to his wife an annuity during her life of 100*l.* a year, and to the mother of his wife another annuity of 100*l.* a year; but were those annuities, those annual payments, to be terminated by the death of the two persons who were thus to take? So far from it, he says, "The said annuities, after the decease of my wife and her mother, to be equally divided between my three children." Well then, whatever it might be, it cannot be that the duration of the subject-matter of the gift was to be measured by the life of the first taker; because he actually provides who shall enjoy this property after the expiration of those lives. We have, therefore, not only the property directed to produce the annuities, which annuities are clearly to last longer than the lives of those who are first to enjoy them, but we have a disposition of the interest in the subject-matter of the gift more extensive than the duration of those lives.

[After referring to the judgment of Lord ALVANLEY, M. R., in a similar case of *Philipps v. Chamberlayne* (1), his Lordship continued as follows:]

Upon the face of the will, therefore, no doubt, I think, can arise that all these annuities were perpetual annuities; that is to say, they were gifts of so much property as should produce the income which he prescribed as the amount of the gifts that he intended for these individuals.

HERON  
v.  
STOKES.  
[ 194 ]

Now, in the events which have happened, of the death of Mary, and the death of the widow of the testator and her mother, Julia Louisa had her own annuity of 100*l.* a year, and she had one-half of the annuity which Mary was intended to have—making 150*l.* a year—and she had one-half of the two annuities given to the widow of the testator and to the mother of that widow, so that she had 250*l.* a year in perpetuity; or, in other words, she had property producing 250*l.* a year, and that in perpetuity. That was the provision which the testator very anxiously provided for her by his will. He gives that as a provision which he intended that his daughter Julia Louisa should possess. To the son he gives the residue; and he provides by the will, in certain events, that the son shall have also some part of the annuity which he had before given. He was to take one-half of the annuity of Mary on Mary's death, and he was also to partake of the annuities given to the widow and the widow's mother; but as he was also entitled to the residue, the annuities payable out of the residue would of course in his hands fall into the residue, because he would be entitled to the fund out of which those annuities were to be paid.

[ 195 ]

Then the testator makes the codicil upon which the decision of Sir EDWARD SUGDEN is made to turn. He had given the residue, he had given property producing a certain income, in the events which have happened, to his daughter Julia Louisa; having provided in the first codicil for the disposition of Mary's annuity, she having died; and here I think the word "and" is of extreme importance, because it does necessarily connect the provision which he made on the actual death of Mary with the prospective provision which he thinks proper to make on the possible death of the son. Now, reading those two codicils together, which I think is essentially necessary for the purpose of seeing what is the meaning of the testator in the codicil upon which the question turns, we find that he says, "It \*having pleased Almighty Providence to take away my daughter Mary, it becomes necessary to alter the disposition of my property after my decease as far as relates to her. I therefore now declare it to be my will, and I hereby direct, that the 100*l.* per annum, &c., provided as within directed for my daughter Mary,"

[ \*196 ]



HERON  
v.  
STOKES.

(and that "*et cætera*" must clearly mean the interest she was to take in the other annuities, in the event of the death of those who are first to enjoy them,) "shall be divided equally between my daughter Julia Louisa and my son William, and that my will, as within expressed, shall remain in all other respects unaltered." He then clearly, up to that period at least, (for he so states in express terms,) did not mean that any other provision in the will should be altered; but he did mean that upon Mary's death, and her annuity therefore being released, it should be divided equally between the two other children, namely, the son, and the daughter Julia Louisa. "And in case"—(I now take up the words the testator has used in the next codicil, which was made a considerable period of time after the first, and seeing what he had done in the event of Mary's death, it is quite clear he intended to carry on the same provision, and to provide for another event which he thought might happen,)—"And in case my son William shall die without leaving issue male lawfully begotten, my will is, that after the decease of my wife Mary and my daughter Julia Louisa, my remaining property shall then be equally divided between" the persons named. What is the natural and obvious meaning of that provision? What is the event which is to make it necessary,—and which alone is to make it necessary—for him to alter the disposition of his property? It is not an alteration of the intention as expressed in the will, and which continues to operate if William shall not die without issue male. It is a provision to take place only if William shall die without issue male; that is, according to the intention expressed in the \*codicil, if William should die without issue male he would not become the object of his annuity. Then he has to dispose of the part of his property which in that event, and according to the intention he then entertained, would remain to be disposed of. Why then he uses a word, though not identical, of the same meaning. The event in which this disposition was to take place was the death of William. The death of William would obviously make it necessary to dispose of that which he had provided for William, because the death of William had nothing to do with that which he had given to his daughter Julia Louisa. But then is there any ambiguity in the expression? The event he expressly refers to is the death of William as the release of the property given to William. What is the property given to William? Why, in the will it is the residue of his property, and in the codicil it is "remaining property." What is the meaning of "remaining property?" That which the

[ \*197 ]

testator has not before disposed of. That is the technical meaning. Nobody speaks of a residue in a will in any other sense, than as that which he has not specifically given. What he has before disposed of forms no part of the residue. Now, can a gift of a money legacy in a will be revoked or altered by a subsequent gift of the residue? and if it cannot be revoked in a will by a subsequent gift of the residue, how can it be revoked by a codicil, all which constitute one testamentary disposition, and are to be considered with reference one to the other? With all the deference I feel for the opinion of a very learned and very distinguished Judge, I cannot entertain a doubt upon the construction. I consider it perfectly plain that he was alluding only to that portion of his property which on the death of William would, according to his view of the interests of his children, be to be disposed of, and that he is disposing of that, and of nothing else; that he is disposing of that which is residue, which residue he had given to William, \*and which residue in the event of William's death he intended to dispose of in a different manner.

HERON  
v.  
STOKES.

[ \*198 ]

If there was more ambiguity in this codicil, no doubt it might require more consideration; but in the view I take of it, it is perfectly plain what the testator meant. We have the description of the property and the event all corresponding; and the question is, whether he meant by this codicil to revoke what he had given to Julia Louisa, and to cut down that, which before by all the authorities was to be a perpetuity, to a life estate; or whether he merely meant to dispose of that which he had before given to William. I consider, according to the natural and obvious construction of this codicil, he meant only to dispose of that which he had before given to William, and that the annuities to Julia Louisa remain just as they were on the face of the will.

[Lord CAMPBELL delivered judgment to the same effect. The decree on the rehearing was accordingly reversed with costs (p. 208).]

### BAYLEE v. QUIN.

(2 Dr. & War. 116—119.)

Construction of will. Annuities held successive, and not cumulative.

CHARLES WILLIAM QUIN, by his last will and testament, bearing date the 9th of February, 1814, after confirming the jointure settled

1842.  
Jan. 21, 22.

SIR EDWARD  
SUGDEN,  
L.C.

[2 Dr. & War.  
116]

BAYLEE  
v.  
QUIN.

upon his wife on her marriage, and bequeathing to her his house and premises in Ballyornan, in the county of Wicklow, and further devising to her all his estates in the county of Armagh, for the term of her natural life, and all the rents, issues, and profits arising therefrom, bequeathed as follows: "Having for some time past the pleasure of contributing 50*l.* per annum towards the pecuniary means of our dearest niece, Mary Walsh, it is needless to request my dearest wife to continue to act in the same manner by her, should my said wife survive me; but in order to give certainty to my intention, I hereby charge my estates in the county of Armagh, with an annuity of 50*l.* British, per annum, payable half-yearly, to our said niece, from the day of my death, and with a further annuity of 50*l.* British, per annum, to commence from the day of the death of my said dearest wife, such annuity or annuities to be secured according to the best legal advice, in such a manner that it shall be for her own sole use without a power of her alienating it to any person whatsoever, except to any child or children she may have; and in case the said Mary Walsh shall die without surviving child, then the said annuity shall cease to be a charge, as above mentioned, on the Armagh estates."

[ \*117 ]

The plaintiffs in the cause were Henry Gough Baylee and his wife Mary, the testator's niece, who had intermarried some time in the year 1828. The annuity of 50*l.* \*was regularly paid up to the period of the death of the testator's widow, which occurred in the month of February, 1840.

The present bill was filed by the plaintiffs, who alleged, that under the decease of the testator's widow, Elizabeth Quin, and under the true construction of his will, they were entitled to a further or additional annuity of 50*l.*, commencing from the day of the decease of the said Elizabeth Quin, and that the Armagh estates became thereby chargeable with an entire annuity of 100*l.* British currency.

The principal defendant, William Charles Quin, the devisee of the Armagh estates, by his answer submitted, that according to the true construction of the will, the plaintiff, Mary, was entitled but to one annuity of 50*l.*

*The Solicitor-General, Mr. Serjt. Warren, and Mr. Francis Fitzgerald, for the plaintiffs.*

*The Attorney-General, Mr. Serjt. Greene, and Mr. Radcliff, for the defendant, William C. Quin.*

## THE LORD CHANCELLOR:

BAYLEE

v.

QUIN.

Jan. 22.

I cannot see any ground for doubt in this case; the testator was possessed of certain estates in the county of Armagh; these estates he gives to his wife for her life, and he directs, that they shall be answerable for all his just debts; and then he proceeds in these words, "having for some time past the pleasure of contributing 50*l.* per annum, towards the pecuniary means of our dearest niece, Mary Walsh, it \*is needless to request my dearest wife will continue to act in the same manner by her, should my said wife survive me." Had the will stopped there, it is quite clear, that the bequest would have been but of an annuity of 50*l.*, during the life of his wife; an annuity of 50*l.*, to endure so long as her estate would enable her to pay the annuity; but, "in order to give certainty to his intention," the testator goes on to charge "all his estates in the county Armagh, with an annuity of 50*l.* per annum, payable half-yearly to our said dear niece, Mary Walsh, from the day of my death." He wished to pay his wife a compliment, but at the same time he intended to make the payment of the annuity certain. But as his niece might survive his wife, he goes on to provide for that event, and he charges the lands, "with a further annuity of 50*l.* per annum, to commence from the day of the death of my said dearest wife." Now, I would ask, was not this necessary? The first charge did not extend beyond the life of the wife; this latter clause was therefore introduced, not alone from caution, but from necessity.

[ \*118 ]

But it is said, why do all this? why could not the testator, in so many words have said, that his niece was to have an annuity of 50*l.* charged on his Armagh estates? of course he could; but he has not thought proper to frame his will in that way; and, indeed, it appears to have been necessary for him to adopt the course he has done, from the way in which he chose to frame his will, and the manner in which the property was settled. His wife was but tenant for life of the Armagh estates; he meant to pay her a compliment, as I have already observed; but he then spoiled it, by adding the clause which follows, "but in order to give certainty," &c. &c. Whether the words in the first part of the bequest would be sufficient to create a trust, which this Court would \*enforce, I need not inquire, the testator having in the next sentence actually charged the Armagh estate with the payment of this annuity.

[ \*119 ]

It is argued, that either of the gifts would have been sufficient to give this lady an annuity for her life. This I deny; for the first

BAYLEE  
v.  
QUIN.

annuity was given but for the life of the wife. The wife, who was the person to pay the annuity, was but tenant for life herself; how then could the annuity endure for a longer period? It is said the testator speaks of annuities; he says "such annuity or annuities to be secured, &c." This is not incorrect, even according to the view I take of the will. The testator is there speaking of the mode, in which these successive annuities are to be secured; but when he comes to speak of their enjoyment, the form of expression is altered; it is, "*it shall be for her own sole use;*" and again, "*in case the said Mary Walsh shall die without surviving child, then the said annuity shall cease.*" He does not there use the words "annuity or annuities;" he speaks in the singular number, whereas, according to the argument, he ought to have spoken of his bounty in the plural number. It would be impossible for me to accede to the view which the plaintiff's counsel have taken of the will, unless I could see an intention to give something beyond what the words express. I cannot discover that intention in the will; it appears to me to be a clear case, and I must

*Dismiss the bill with costs.*

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RUSSELL v. DICKSON.

(2 Dr. & War. 133—141.)

1842.  
Feb. 7.  
SIR EDWARD  
SUGDEN,  
L.C.  
[ 133 ]

[AFFIRMED on appeal to the House of Lords, as reported in 4 H. L. C. 298.]

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WRIXON v. VIZE.

(2 Dr. & War. 192—207; S. C. 1 Con. & L. 298.)

1842.  
Feb. 10, 11.  
SIR EDWARD  
SUGDEN,  
L.C.  
[ 192 ]

Where an equity of redemption is put in settlement, though the tenant for life is the party bound to pay the interest upon the mortgage, yet the mere *laches* of the mortgagee to demand the interest from the tenant for life will not prejudice his claim against those in remainder.

[This case is reported upon a petition of rehearing in 3 Dr. & War. 104, and is accordingly reserved until that volume is reached, but there is a passage in the report of the original judgment upon the point mentioned in the above head-note which may be conveniently inserted here.—O. A. S.]

In the course of his judgment the LORD CHANCELLOR said :]

[ 202 ]

It is insisted that the large arrear of interest, found to have accrued due to the plaintiffs, during the life of the tenant for life, cannot bind the present defendants, as remainder-men under the

settlement. This, however, appears to be contrary to all the rules of the Court; a mortgagor cannot, by putting the equity of redemption in settlement, affect the rights of the mortgagee against the mortgaged property. He cannot, by carving out derivative interests in the equity of redemption, create any rights which he had not himself. No doubt, the \*tenant for life is the party bound to pay the interest; but still, mere laches or neglect to demand the interest from the tenant for life will not prejudice the claim of the mortgagee against those in remainder. This was decided by *Loftus v. Swift* (1) in this Court before Lord Redesdale, and is the settled rule of this Court.

WRIXON  
r.  
VIZE.

[ \*203 ]

### FRENCH v. MACALE (2).

(2 Dr. & War. 269—284; S. C. 1 Con. & L. 459.)

1842.  
May 9, 11.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 269 ]

A lease of several denominations of lands, in respect of which different rents were reserved, and part of which appeared to be ancient meadow, contained a covenant on the lessee's part, not to burn the demised premises, or any part thereof, under the penalty of 10*l.* per acre, to be recovered as the reserved rent, for every acre so burned: the assignee of the lease threatened to burn part of the premises, insisting upon his right so to do under the said covenant, upon payment of the sum specified therein, as liquidated damages: Held that he was not entitled to do so, and that the Court would interpose by injunction to restrain him from so doing.

Where the covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do the act; and before the act is done this Court will restrain him by injunction: but if the act is done, the penalty must be paid, and the amount is unimportant.

If a party covenant not to do a particular act, he cannot protect himself from discovery, if he has done the act, by alleging that there was a penalty attached to the performance of that act.

By indenture dated the 1st of May, 1797, made between Robert French, of the one part, and Richard Macale of the other part, the said Robert French, in consideration of the rents and covenants, demised to the said Richard Macale, the lands of Carane, Ruvaugh Park, containing forty-nine acres, at the rent of 13*s.* per acre, also the lands of Pullevallane Park, containing fifty acres at 11*s.* per acre; also the lands of Croughroe Park, containing thirty acres, at 16*s.* per acre, and also part of the lands of Kilbeg, containing ten acres and nineteen perches, at 15*s.* per

(1) 2 Sch. & Lef. 642.

(2) *Lord Elphinstone v. Monkland Iron and Coal Co., Ltd.* (1886) 11 App. Cas. 332; *Weston v. Metropolitan*

*Asylums District* (1882) 9 Q. B. Div. 404; 51 L. J. Q. B. 399; 46 L. T. 580; *Wallis v. Smith* (1882) 21 Ch. Div. 243; 52 L. J. Ch. 145; 47 L. T. 389.

FRENCH  
v.  
MACALE.

[ \*270 ]

acre ; to hold to the said Richard Macale, his executors, administrators, and assigns, for three lives, (therein named) and thirty-one years, yielding and paying yearly, &c. &c. ; the said Richard Macale thereby covenanting for himself, his executors, administrators, and assigns, not to alien the demised premises or any part thereof, without first giving a preference to the said Robert French, &c., and also, “ not to burn, or bate the demised premises or any part thereof, under the \*penalty of 10*l.* per acre, to be recovered as the reserved yearly rent, for every acre so burned, save and except Pullevallane Park, which may be burned, bate, and laid down, with grass seeds, under the inspection of Mr. James Macale,” and also to pay the yearly rent ; and to permit the said Robert French, to plant trees on any part of the said demised premises, paying compensation for the land so planted. The lease also contained a covenant on the part of the lessor, for quiet enjoyment ; and a provision, that Richard Macale, his executors, administrators, and assigns, might surrender the demised premises, or any denomination thereof, on the 1st of May, in every third year during the demise, on giving six months’ notice in writing, to the said Robert French.

Under this lease, Richard Macale entered, and continued in possession until the time of his death ; by his will he devised the lands to Richard James Macale, who subsequently demised the lands of Croughroe to his sons, Walter and James Macale. It appeared from the pleadings in the cause, that these lands of Croughroe were ancient meadow, and had not been broken up for upwards of fifty years ; that Richard James Macale, was in embarrassed circumstances ; that Walter and James had declared their intention of setting the said lands of Croughroe in con-acre, that they had advertised and offered to let for burning thirty acres thereof ; and had actually proceeded to turn up a portion of the said lands, in order that the same might be surveyed and apportioned for burning.

[ \*271 ]

Under these circumstances Robert French, the lessor in the said lease of 1797, filed a bill in the month of March, 1842, against Richard James, Walter, and James Macale, \*by which he prayed that the defendants might be restrained by injunction, from ploughing or turning up, or permitting to be ploughed and turned up, and from committing any waste on, the said demised premises.

An affidavit verifying the contents of the bill, was filed on the

FRENCH  
c.  
MACALE.

5th of April, 1842, and on the following day, the plaintiff, upon a petition presented to the Lord Chancellor, in Chamber, the Court being not at that time sitting, obtained an injunction until answer or further order, with liberty to the defendants at any time to apply to dissolve same. Subsequently to the obtaining of this order, the defendants filed their answer, admitting the statements of the bill, and that they did intend to break up and burn the part of the premises as in the bill mentioned: but they contended, that the plaintiff's remedy was in a court of law, and that this Court had no jurisdiction to interfere, the 10*l.* per acre, reserved in the covenant of the said lease, being in the nature of liquidated damages, for burning any part of the demised premises.

The plaintiff now moved in this Court, by the direction of his Honour the MASTER OF THE ROLLS, to dissolve the injunction.

*Mr. Brooke, and Mr. Concannon, for the motion.*

*Mr. Monahan, and Mr. M'Nevin, contra.*

The arguments of counsel and the authorities cited, are so fully discussed and commented on, in the judgment of the LORD CHANCELLOR, that it has not been considered necessary to insert them here.

THE LORD CHANCELLOR:

[ 272 ]

I thought that the question, which has been raised upon this motion, had been perfectly settled; that where the effect of a contract was an agreement not to do a particular act, although the parties had annexed a penalty to the breach of the contract, this Court would, by injunction, prevent the doing of that act. The cases which have been cited in support of the motion to dissolve the injunction, are very distinguishable from the present case. This penalty is not a stipulation for the payment of so much in gross by the year, for every acre, and this makes all the difference; for if a contract be, that the party shall not break up the ground, or if he chooses to do so, that he shall pay so much annually, that leads to the inference, that though there was a general prohibition against the act, yet, the parties contemplated the right to do it, upon payment of the compensation. The question is, whether the specification of this sum of 10*l.* is a waiver altogether of the remedy, which the law gives, if a man does what he has covenanted not to do. Now where a party covenants not to do a certain thing,



FRENCH  
v.  
MACALE.

and then proceeds to say, if I do that thing, I will pay you 100*l*. by way of satisfaction, this agreement does not prevent the Court from saying, you shall be enjoined from doing that particular thing. Lord HARDWICKE, in the case of *Howard v. Hopkyns* (1), said, “in all cases where penalties are inserted, in case of a non-performance, this has never been held to release the parties from their agreement, but they must perform it notwithstanding.” The object at which this Court aims, is the accomplishment of the intention of the parties; and I have no doubt but that by acting on this principle, and by the rules adopted in \*cases of specific performance of agreements, this Court has promoted good faith among Englishmen.

[ \*273 ]

The case of *Chilliner v. Chilliner* (2), has established, that although the penalty may be very small, and the property very large, the Court may enforce a specific performance of the agreement; for the agreement to do the act is considered as a contract independent of, and distinct from, the agreement as to the penalty, and a court of equity fastens on the real contract, and compels the execution of the very thing covenanted to be done. This case has been followed by the case of *Logan v. Wienholt* (3) in the House of Lords, a case of great authority; however, I will look into the cases which have been cited, before I dispose of the motion finally.

May 11.

THE LORD CHANCELLOR :

In this case, it appears that a lease was executed so far back as the year 1797, of several denominations of lands, reserving different rents, which, however, may be taken at an average of about 14*s*. per acre, for a term of three lives and thirty-one years : the lease contains a covenant in these words ; (Here the LORD CHANCELLOR read the covenant against burning the land); this is followed by a power given to the tenant of surrendering all the demised premises, or any denomination of them, on the 1st of May in every third year during the demise, upon giving due notice of his intention of so doing. It is stated in the bill, that a portion of the demised lands is ancient meadow, and has not been broken \*up for fifty years ; and this is admitted by the answer. It appears that the original lessee died, having disposed of the property by will, and the defendant, who succeeded to it, being in embarrassed circumstances subdemised to his sons, and the latter having threatened to sublet and burn

[ \*274 ]

(1) 2 Atk. 371.

(2) 2 Ves. Sen. 528.

(3) 36 B. R. 215 (1 Cl. & Fin. 611).

parts of the lands (in fact it is avowed that such was their intention in taking these lands) the present injunction was obtained. The defendants admit that this mode of cultivation would materially deteriorate the property, but insist they have a right, under the clause of the lease which I have read, to adopt this system if they please; for by this clause, they say, liquidated damages are provided in case the act should be done, and that this Court consequently cannot interfere.

FRENCH  
v.  
MACALE.

The question before the Court is, whether the injunction, which has been obtained upon this state of facts, should now be dissolved. The case has been argued before me, on both sides, as if this 10*l.* per acre was a sum in gross payable for the doing of such an act; I observed that it might make a difference, whether this was so or not; but I shall now consider the case as if it was one sum in gross per acre, and the other point, viz., whether there is a continual covenant not to burn, under the penalty of an additional yearly rent, must be decided at the hearing.

The question now to be decided depends upon two matters, first on the frame of the lease, and then upon the general rules of equity. The terms of the lease are, that the party will not do the act under a penalty; therefore it is a covenant against doing the act, and a stipulation that, if he shall do it, he is to pay a particular sum per acre. The general rule of equity is, that if a thing be agreed upon to be done, though there is a penalty annexed to secure its \*performance, yet the very thing itself must be done. If a man for instance agree to settle an estate and execute his bond for 600*l.*, as a security for the performance of his contract, he will not be allowed to pay the forfeit of his bond and avoid his agreement, but he will be compelled to settle the estate in specific performance of his agreement. So if a man covenant to abstain from doing a certain act, and agree, that if he do it, he will pay a sum of money; it would seem that he will be compelled to abstain from doing that act, and, just as in the converse case, he cannot elect to break his engagement, by paying for his violation of the contract. This I apprehend is the general rule of equity. It is so laid down by Lord HARDWICKE in *Howard v. Hopkyns* (1), and by Lord THURLOW in *Sloman v. Walter* (2); as far as relates to settlements, the rule was established by *Chilliner v. Chilliner* (3), which was followed in the very imperfectly reported case of *Logan v. Wienholt* (4), and also in *Roper*

[ \*275 ]

(1) 2 Atk. 371.

(3) 2 Ves. Sen. 528.

(2) 1 Br. C. C. 418.

(4) 36 R. R. 215 (1 Cl. & Fin. 611).

FRENCH  
v.  
MACALE.

*v. Bartholomew* (1), and again in *Hardy v. Martin* (2). Now from all these cases it appears, that the question for the Court to ascertain is, whether the party is restricted by covenant from doing the particular act, although if he do it a payment is reserved; or whether according to the true construction of the contract, its meaning is, that the one party shall have a right to do the act, on payment of what is agreed upon as an equivalent. If a man let meadow land for two guineas an acre, and the contract is, that if the tenant choose to employ it in tillage, he may do so, paying an additional rent of two guineas an acre, no doubt this is a perfectly good and unobjectionable contract; the breaking up the land is not inconsistent with the contract, \*which provides, that in case the act is done the landlord is to receive an increased rent. The whole amount of Lord HARDWICKE's *dicta* in *Roy v. The Duke of Beaufort* (3), and *Benson v. Gibson* (4), and elsewhere, is that if a man do the act, pay he must. These *dicta*, therefore, which have been referred to do not bear on the case now before the Court. In the same way a man cannot protect himself against discovery, if he has done the act, which he has covenanted not to do, because a penalty is annexed; if he engages not to do the act, he cannot be heard to say, this is a penalty; and whether the whole is or is not recoverable, he must in this Court make discovery whether he has done the act. This was decided in *Richards v. Cole*, referred to in Lord Redesdale's Treatise (5), and in *Jones v. Green* (6).

[ \*276 ]

The cases, which have been decided upon the present subject are, no doubt, at first view, not perfectly consistent, and I am not sorry that I have had an opportunity of looking through the authorities. The question in every case is, what is the real meaning of the contract? In *Woodward v. Gyles* (7), the agreement was, that the defendant should "not break up or plough any part of the land, and if he did plough any part of it, that he would pay at the rate of 20s. per acre per annum," and the Court held that the parties had fixed a price for the ploughing, and refused an injunction. The decision was perfectly right; the agreement was exactly such as I have before alluded to, that the party should have power to do the act upon payment of an additional rent; the reservation of the increased rent during

(1) 12 Price, 796.

(2) 1 Cox, 28.

(3) 2 Atk. 190.

(4) 3 Atk. 395.

(5) [Milford on Pleading] Page 193, 4th ed.

(6) 3 Y. & J. 298.

(7) 2 Vern. 119.

the \*whole term shows, that the parties contemplated the payment of one rent in one event, and of another rent in another state of circumstances. The next case is *Rolfe v. Peterson* (1), which was the subject of much consideration. There a certain rent was reserved, and the lessee covenanted, that in case any part of the lands, which had been in tillage for the last twenty years, should be broken up, he would pay the further rent of 5*l.* per acre for every acre so broken up, over and above the rent reserved, and upon the same days of payment. The Court held, that this was a case of liquidated damages, fixed and agreed on between the parties. Nothing could be more express than the contract in that case; it clearly amounted to the reservation of an additional rent, to be paid for so much land as should be broken up during the whole term; and the Court being of that opinion reversed the decision of Lord CAMDEN, who had erroneously treated it as a mere case of damages. The same doctrine is laid down in *Ponsonby v. Adams* (2). In *Astley v. Weldon* (3) we find Lord ELDON saying (4), with reference to *Rolfe v. Peterson*, “both in *Rolfe v. Peterson*, and in *Ponsonby v. Adams*, I should have said, that what was matter of contract, bottomed on a good consideration, should not be looked upon as penalty, but should be considered as rent reserved, or liquidated damages.” This sufficiently shows the leaning of Lord ELDON’s mind. Again, Mr. Justice HEATH says, “in *Rolfe v. Peterson*, it was held that the sum mentioned was in the nature of increased rent, because it was said that the tenant was liable to distress. But if the tenant had only covenanted generally not to cut down the furze, and at the end of the lease a sum of money had been \*inserted, to be paid in case of breach of performance of the covenants, that sum would have been in the nature of a penalty.” That very learned Judge therefore draws the precise distinction between a sum in gross and a reservation *qua* rent; and Mr. Justice CHAMBERE observes (5), “I remember that the case of *Rolfe v. Peterson* was not thought altogether satisfactory at the time when it was decided, though I do not feel any objection to the determination.”

There was a case of the same nature in this country, which came before Lord Lifford, *Forbes v. Carney* (6); there the lessee had covenanted not to break up for tillage more than a certain quantity of the land in any one year, and that if he did so, he should pay

FRENCH  
v.  
MACALE.  
[ \*277 ]

[ \*278 ]

(1) 2 Br. P. C. 436, Toml. ed.

(2) 2 Br. P. C. 431, Toml. ed.

(3) 5 R. R. 618 (2 Bos. & P. 346).

(4) 5 R. R. 622 (2 Bos. & P. 351).

(5) 2 Bos. & P. 354.

(6) Wallis by Lyne, 38.

FRENCH  
v.  
MACALE

an additional rent of 12s. an acre. The Court refused an injunction, the parties having themselves prescribed a recompense for the ploughing. This is consistent with the general rule, and was decided upon the same grounds, as the cases to which I have alluded. The decision in *Jones v. Green* (1) is to the same effect.

[ \*279 ]

There are certain established exceptions to the general rule, to which I shall now advert. The first is found in the case of *Barret v. Blagrove* (2); there the defendant's house adjoined Vauxhall Gardens, and was let on certain terms, introduced to prevent any interference with the profits of the gardens, upon penalty of a forfeiture of the lease, and payment of 50*l.* a month to the proprietors of the gardens; Lord ROSSLYN granted the injunction, observing, "that it was in the nature of a specific performance." The continuing payment would seem to require that the case should fall \*under the class, which I have before considered; but the provision for the forfeiture of the lease clearly showed, that the intention of the parties was the other way; that the act was not to be done upon any terms. The case afterwards came before Lord Eldon (3), and it appearing that the alleged breach of covenant had been continued for eleven years, without any interruption from the proprietors of the gardens, upon the ground of this long acquiescence the injunction was dissolved, Lord ELDON saying, "may not a very different question be made; whether, if you have permitted this to go on for eleven years, you must not take your chance at law?" So that Lord ELDON does not doubt that an injunction might be granted in such a case, but in the particular case he refused it, because after the lapse of eleven years, the party had no right to come into this Court for relief.

In the case of *Maxwell v. Mitchell* (4) the lease contained two covenants; one against subletting, and providing, that in case the party should sublet, he was to forfeit a further additional yearly rent of 80*l.*, to be paid and recovered in like manner as the original rent; the other, against cutting turf, contained a similar provision in case of a breach, that is to say, that the tenant should pay an additional rent of 10*l.*, for every acre so cut. From the statement of the facts of that case it appears that the first covenant had been broken, and the penal rent paid for more than twenty years; and then an injunction was asked for a breach of the other covenant, and the increased rent was also claimed for the time past. The

(1) 3 Y. & J. 298.

(2) 5 Ves. 555.

(3) 6 Ves. 104.

(4) 1 Ir. Eq. R. 359.

MASTER OF THE ROLLS discussed all the cases, and decided that the injunction should be continued to the hearing. I \*cannot agree with the view taken in his judgment of some of the authorities, and it may be doubted whether that case could be supported; for in the first place the forfeiture of an additional rent was to continue during the whole term; and secondly, the receipt of the penal rent showed, that the parties were acting on the contract, as if it conferred on the tenant a right to do the act, he paying for the privilege. The question, however, depended upon a complicated state of facts, and was rather postponed, than decided. In *Burne v. Madden* (1) the lessee covenanted not to dig clay, or plough up the lands demised, and in case he did so, he was to pay 5*l.* for every cast of clay, which he should dig up, and also 5*l.* in addition to the rent, for every acre demised, so long as any part should continue broken up. The MASTER OF THE ROLLS was of opinion "that the sum mentioned in the covenant, being disproportioned to the damage contemplated, was in the nature of a penalty." Now both Lord HARDWICKE and Lord ELDON lay it down, that the amount of the sum to be paid ought to have no operation: it might therefore be doubted, whether this case of *Burne v. Madden* was decided upon satisfactory grounds; but independently of these two cases, there can be no doubt as to the general rule of law upon the subject, and the only difficulty is the application of that rule to each particular case.

FRENCH  
v.  
MACALE.  
[ \*280 ]

I have not yet cited any case in which there was not a continued reservation of payments of additional rents; but I shall now consider what the law is, when there is to be only one payment made for a continuing act. The case of *The City of London v. Pugh* (2) decided, that where there is a prohibition against doing a particular act, with a sum to be paid \*in case the act is done, this Court is bound to interfere, and by injunction prevent the doing of that act. In that case, the demised premises consisted of a house, and bowling-green annexed; the lease contained a covenant for the preservation of the bowling-green in good order, and that if any part of the demised premises should be broken up, or digged for the purpose of raising gravel, the lessee was to pay 100*l.* for every acre, which should be so broken up. The lessee converted part of the premises into a gravel-pit, and raised and sold an immense quantity of gravel. An injunction was obtained, but dissolved by Lord KING, on cause shown. The question came before the House of Lords, upon the very same grounds that are

[ \*281 ]

(1) L. & G. t. Plunket, 493.

(2) 4 Br. P. C. 395, Toml. ed.

FRENCH  
R.  
MACALE.

raised in this case, and the Lords reversed the order, and directed that the Court of Chancery should grant an injunction to be continued to the hearing of the cause, not upon the amount of the penalty, but on this ground, that if a man covenants not to do an act, his payment of a penalty, annexed to his doing that act, does not oust this Court of its jurisdiction to prevent his doing the act. It is quite clear, that the amount of the penalty cannot influence the Court. In *Roy v. The Duke of Beaufort* (1), Lord HARDWICKE says, "I do not know that courts of equity, where a bond is entered into voluntarily, have gone so far as to take into their consideration the greatness or smallness of the penalty;" and in *Astley v. Weldon* (2), Lord ELDON observes, that "a principle has been said to have been stated in several cases, the adoption of which one cannot but lament, namely, that if the sum would be very enormous and excessive, considered as liquidated damages, it shall be taken to be a penalty, though agreed to be paid in the form of a contract;" and then he adds, "but nothing can be more

[ \*282 ] \*obvious, than that a person may set an extraordinary value upon a particular piece of land, or wood, on account of the amusement which it may afford him." In *Hardy v. Martin* (3), Lord LOUGHBOROUGH says, "the penalty is never considered in this Court, as the price of doing what a man has expressly agreed not to do:" he then explains his view of *Rolfe v. Peterson*, which I think is the true one; "as to the case of *Rolfe v. Peterson*, that was a case of a demise of land to a lessee, to do with the land as he thought proper, but if he used it in one way, he was to pay one rent, and in another way, another. That is a different case from an agreement not to do a thing, with a penalty for doing it. The former is a case, in which this Court will not interfere; but this is the case of an agreement not to sell brandy, with a penalty for selling it." That is exactly the case now before the Court; that is to say, the party here has no right to do the thing, paying one rent if he does it, another rent if he does not.

In Mr. Fonblanque's note to the first volume of *The Treatise on Equity* (4), he refers to a case which I have never seen; the passage is this: "But there are some circumstances, which will induce the Court to interfere, though stipulated damages be reserved; as where the lessee had covenanted not to plough ancient meadow, or if he did, to pay an increase of rent. The Court, upon

(1) 2 Atk. 190.

(2) 5 R. R. 681 (2 Bos. & P. 346).

(3) 1 Cox, 26.

(4) Vol. i. p. 154.

his threatening to plough, appears to have granted an injunction: *Webb v. Clarke*, 8th May, 1782; " so that even where an increase of rent was provided, if the restriction related to ancient meadow, as is partly the present case, the party has been restrained from doing the act. That case properly belongs to \*the first class of cases, and deserves further consideration, and it would be necessary to ascertain the facts from the Registrar's book. In *Carden v. Butler* (1), the lease contained a covenant against turning up the ground, under a penalty of 5*l.* per acre; and Chief Baron Jox said, they were all of opinion, that this was a case of a penalty properly so called, and not a case of liquidated damages, and granted the injunction.

FRENCH  
r.  
MACALE.

[ \*283 ]

A case has been referred to of *Molony v. Quail* (2), decided in 1835, where it was held, that the 12*l.* per acre, to be paid on the violation of the covenant, was liquidated damages; all I can say is, that that case would appear to be in direct opposition to all the authorities, unless it could be maintained upon the peculiar nature of the stipulation in that case. This Court has no authority to overrule a decision of the House of Lords. Where a case involves a clear principle, which has been the subject of decision of the House of Lords, that decision must be followed by this Court, and every other inferior Court. Now, the case of *The City of London v. Pugh* (3), is a direct authority upon this question, and must, consequently, be followed.

Is there then anything to take this case out of the general rule? At the time of the execution of this lease, the penalty imposed by the statute (4) for burning land was 5*l.* per acre; the penalty which the lease attaches to a violation of the covenant, is 10*l.* an acre; but the Court must grant an injunction, although the statute (5) now gives a penalty \*of 10*l.*, unless, in the words of Lord LOUGHBOROUGH, the penalty under the covenant is reserved in such a manner, as to show, that it was intended that the lessee should do with the land as he thought proper; the mere reservation of that which the Act of Parliament gives, cannot take away the jurisdiction of this Court. In every case of this nature the question is one of construction. If, as in *Woodward v. Gyles*, and *Rolfe v. Peterson*, there is evidence of the intention, that the party is to be at liberty to do the act if he chooses to pay an increased rent, of course the

[ \*284 ]

(1) 1 Hayes & J. 112.

(2) 4 Law Rec. N. S. 107.

(3) 4 Br. P. C 495, Toml. ed

(4) 11 Geo. III. c. 2.

(5) 40 Geo. III. c. 24.



FRENCH  
v.  
MACALE.

Court cannot interfere, because this Court never interferes against the express contract of the parties. But where, as in the present case, no such intention appears, then, following the authority of *The City of London v. Pugh*, I must decide, that the party is not to be permitted to do the act.

Where the covenant is not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, this penalty does not authorize the party to do the act ; and before the act is done, this Court will restrain him by injunction ; but if the act is done, the penalty must be paid, and the amount is unimportant. Upon the whole, I am of opinion, that the view which I took of this case on the former day was correct, and that this motion must be refused. Let the costs be reserved for the hearing.

1842.  
Feb. 12.

# IN RE ROCHE.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 287 ]

(2 Dr. & War. 287—291 ; S. C. 1 Con. & L. 306.)

Power in a settlement to appoint new trustees, in case that any of the trustees therein nominated “ should become incapable or unfit to act ” in the trusts thereof: Held, that by the bankruptcy of a trustee, he “ became unfit to act,” within the meaning of the power.

The power to appoint new trustees directed, that upon such appointment being exercised, the trust estate should be vested in the newly appointed trustee, jointly with the surviving or continuing trustee: Held, that the meaning of such a power was to appoint new trustees, whenever the event requiring such a change should arise; and that a valid appointment of, and a transfer of the estate to, new trustees might be made, under the power, notwithstanding the removal of the surviving trustee.

The Court never appoints a new trustee without a reference to the Master.

By indenture of the 6th of November, 1821, executed on the marriage of the petitioners, James Joseph Roche and Katherine, his wife, a sum of 6,000*l.*, which was the fortune of the lady, was vested in Gerrard Callaghan and Bartholomew Verling, upon the trusts therein mentioned: certain real estates were by the said deed settled upon the marriage, and two terms of 99 years and 500 years were created to secure a jointure for the wife and portions for the younger children of the marriage.

The deed also contained a provision in the following terms, “that in case either of the four trustees thereby nominated and appointed, or any succeeding or new trustee or trustees to be thereafter appointed, should happen to die or should go to reside beyond the seas, or become incapable or unfit to act in the said trusts, before the same should be executed, performed, and determined, then, and

In re  
ROCHE.

so often as the same should happen, it should be lawful for the said James Joseph Roche and Katherine Roche during their joint lives, or the survivor of them, or the executors or administrators of the survivor of them, together with the surviving or continuing or acting trustee for the time being, by any deed or writing under their hands and seals to nominate, substitute, and appoint, some other fit person to supply the place of the trustee so dying, going beyond the seas, or becoming incapable or unfit to act as aforesaid, and so from time to time as often as any such death, departure, or incapacity, should occur, and that immediately \*after such appointment the trust estates, monies, and effects, then vested, under and by virtue of these presents, in the trustee so dying or going to reside beyond the seas, or becoming incapable or unfit to act as aforesaid, should be conveyed, assigned, transferred, and assured respectively, according to the nature and tenure thereof, in such manner that the same might be legally and effectually vested in the newly appointed trustee jointly with the surviving or continuing trustee, their heirs, executors, administrators, and assigns, to the uses, upon the trusts and for the several intents and purposes as therein created, expressed, declared, and contained, of and concerning the same or such of them as should be then subsisting and capable of taking effect, and that every such new trustee should and might in all things, and in all respects, act and assist in the management and executing the trusts, to which he should be appointed, as fully and effectually as if such new trustee had been originally by said indenture nominated and appointed."

[ \*288 ]

Gerrard Callaghan having died in the year 1833, and B. Verling having been declared a bankrupt in the [year] 1837, and Thomas Biggs Lane having been appointed his assignee, a petition was now presented on the part of Mr. Roche and his wife, under the 6 & 7 Will. IV. c. 14, s. 93, praying that Verling might be removed from the trusteeship, and that Richard Callaghan and George Callaghan might be appointed in his stead, or that it might be referred to the Master to approve of two fit and proper persons to be appointed trustees.

The *Solicitor-General* and *Mr. Hunt* in support of the petition :

This application is made under the 93rd section of the \*Bankrupt Act (1), which empowers the Court to order the assignees of a bankrupt trustee, and all persons, whose consent is necessary, to

[ \*289 ]

(1) See now the Trustee Act, 1893, s. 25.

In re  
ROCHE.

convey and assign the estate and interest to such person, as the Lord Chancellor shall think fit. \* \* \*

THE LORD CHANCELLOR:

What jurisdiction have I to grant the prayer of this petition? This Court has no power to appoint new trustees upon petition, except what is specially given to it by statute; it cannot interfere, unless some disability is made out in the existing trustee. But here no case of disability has been shown, and there is a power to appoint new trustees in the settlement; the very event contemplated has occurred, for the trustee, by becoming bankrupt, is "unfit to act" in the administration of the trust. The case before the Vice-Chancellor of England does not apply, for there there was a disability; the surviving trustee was out of the jurisdiction.

[ \*290 ]

The *Solicitor-General* then submitted that there was this \*difficulty, that the appointment was to be made by the petitioners "together with the surviving or continuing trustee," and the property was to be "vested in the newly appointed trustee, jointly with the surviving or continuing trustee;" a similar point was raised in the case of *Morris v. Preston* (1), and was abandoned it was true; but some doubts have been since thrown on the case, and in *The Treatise of Powers* (2), it is said, that "it is to be regretted that the opinion of the Court was not taken upon the point."

THE LORD CHANCELLOR:

That was a peculiar case, very different from the present. The power there to be exercised was one of sale, by the operation of which the old uses were to be defeated. Nothing of that kind is contemplated here. The case, however, is one of very high authority. The fair meaning of such a power plainly is, to appoint new trustees, whenever the event requiring such change should arise; however, as you have been at the expense of the petition, I will make the order, but I wish it to be distinctly understood that I consider it altogether unnecessary.

The *Solicitor-General* having asked for an appointment, without a reference to the Master,

The LORD CHANCELLOR said there must be a reference to the Master, that the Court never appointed a trustee without such reference.

## HARRISSON v. DUIGNAN.

(2 Dr. &amp; War. 295—306; S. C. 1 Con. &amp; L. 377.)

1842.  
April 18.SIR EDWARD  
SUGDEN,  
L.C.

[ 295 ]

The appointment of a receiver in a cause concerning infants' property will not prevent the operation of the Statute of Limitations on a claim affecting the infants' estate, notwithstanding the fact that the Master, in a report ascertaining the nature of the property, has expressly found that it was subject to that incumbrance.

A. grants an annuity to a trustee for B. for his life, and in the conveyance enters into a personal covenant with B. for payment of the annuity. A. subsequently sells, subject to the annuity: Held, on a bill filed by B. against the purchasers to raise the arrears thereof, (A. or his personal representative not being a party to the cause), that though there was an obligation imposed on the purchaser to indemnify A., yet that the Court would not thus indirectly enforce this obligation, and thereby in effect evade the operation of the Statute of Limitations; and accordingly the account was limited to a period of six years prior to the filing of the bill.

By indenture of the 18th of February, 1828, made between Peter Kyne of the first part, Bryan Kyne, father of the said Peter, of the second part, and Edward Mills Harrisson, one of the plaintiffs, of the third part: Peter Kyne, after reciting that he was entitled to the lands of Clonaquin and Rathbrennan, in the county of Roscommon, and certain other lands in the county of Galway, in consideration of the love and affection which he bore towards his father and his brothers and sisters, and in order to make a provision for their support and maintenance, granted unto the said Edward Mills Harrisson a certain dwelling-house and paddock adjoining same, situate on the lands of Clonaquin, for the term of ninety-nine years, if the said Bryan Kyne should so long live; and also an annuity or yearly rent-charge of 100*l.*, to be issuing out of the said lands of Clonaquin and Rathbrennan, for and during the term of the natural life of the said Bryan Kyne, upon trust to permit the said Bryan Kyne, and his son and daughters, to hold and enjoy the said dwelling-house and paddock for their support and maintenance; and in case the said Bryan Kyne, and his said son and daughters, should not choose to reside therein, that the said Edward Mills Harrisson should set the same, and apply the rent thereof, and also the said annuity of 100*l.*, in and towards the support and maintenance of the said Bryan Kyne and his said younger children, for and during the life of the said Bryan Kyne, or until they should be otherwise provided for, in such manner as to the said Bryan Kyne should seem fit and proper.

The deed then provided, that the annuity should not be subject to the debts of Bryan Kyne, and that he should not have power to anticipate same: it gave to Bryan Kyne a power of distress and

[ 296 ]

HARRISSON  
v.  
DUIGNAN.

entry in the event of the annuity being unpaid; and Peter Kyne covenanted for himself, his heirs, executors, and administrators, to and with Bryan Kyne, his executors, administrators, and assigns, "that he would from time to time, and at all times thereafter, during the life of the said Bryan Kyne pay the said annuity" upon the days and in the manner therein appointed, with a proportionate part of the same up to the day of the decease of the said Bryan Kyne.

Bryan Kyne had, at the time of the execution of this deed, three younger children, Bryan Kyne the younger, since deceased, Catherine, the wife of the defendant Thomas Brennan, also since dead, and Mary, who had intermarried with Daniel Byrne, and was one of the co-plaintiffs in the cause.

Bryan Kyne and his children remained in occupation of the house and paddock until November, 1830, up to which time the annuity was regularly paid. In April, 1831, Bryan Kyne being convicted of felony was transported to New South Wales; and subsequently, in the month of February, 1835, was executed for murder.

In the month of June, 1831, Peter Kyne sold his estate and interest in the lands of Clonaquin and Rathbrennan to Peter Duignan, in trust for John Duignan (the father of the principal defendants); the conveyance to Duignan, which bore date the 24th of June, 1831, recited fully the deed of the 18th of February, 1828, and expressly reserved "unto Bryan Kyne, and his assigns, during the term of \*his natural life, the said dwelling-house and paddock of land adjoining, &c. &c. The lands were conveyed, subject likewise to the payment of the annuity to the said Edward Harrisson for the life of Bryan Kyne, and in the covenant on the part of Peter Kyne against incumbrances, the deed of the 18th of February, 1828, was expressly excepted.

[ \*297 ]

The principal defendants in the cause were the sons of John Duignan, claiming under his will; they were made wards of this Court in the year 1831, upon a petition presented by their mother; and a reference having been made to the Master, to inquire and report the nature and amount of their fortunes, he, in pursuance thereof, made his report on the 9th of February, 1832, and stated therein, that the minors were entitled to these lands of Rathbrennan and Clonaquin, "subject to a certain annuity or yearly sum of 100*l.* during the life of Bryan Kyne." This report having been confirmed on the 9th of May, 1832, an order was made "in the

*matter of the Duignans minors,"* and also in a certain cause of *Duignan v. Duignan*, referring it to the Master to appoint a receiver over the lands of Rathbrennan and Clonaquin. On the 9th of November, the Master made his report, approving of Martin Conolly as a fit and proper person to be receiver. This report was subsequently confirmed, and Conolly was accordingly appointed receiver; and on the 22nd of January, 1832, the order was served on the tenants to pay their rents to the receiver; and this receiver continued to receive the same, up to the filing of the bill in the present cause, the sons of John Duignan being still minors.

HARRISSON  
v.  
DUIGNAN.

The bill was filed by Edward Mills Harrisson and Mary Byrne, the only surviving child of Bryan Kyne, \*and also the personal representative of her brother, Bryan Kyne, the younger, against the children of John Duignan, Brennan, the husband and administrator of his wife Catherine, and others, stating the above-mentioned matters, charging, that the defendants, the minors, had, since the death of their father, let the said house and paddock, and received the rents and profits thereof; and praying for an account on foot of the annuity, and of the said rents of the dwelling-house and paddock, and that same might be paid to Harrisson, according to the trusts of the deed of the 18th of February, 1828.

[ \*298 ]

The minor defendants by their answer submitted, that by the felony of Kyne, the right to the annuity in question was vested in the Crown, and that, consequently, the *Attorney-General* was a necessary party; and that the arrears of the annuity, which accrued for six years prior to the filing of the bill, only could be recovered.

The bill was subsequently amended by making the *Attorney-General* a party; but the question as to the rights of [the] Crown, resulting from the conviction of Bryan Kyne, was not discussed; the *Attorney-General* having declined to press any right which the Crown might have.

Peter Kyne, the grantor in the deed of the 18th of February, 1828, was not represented in the cause; it was stated at the Bar that he was dead.

The *Attorney-General*, Mr. T. B. C. Smith, and Mr. Charles Andrews, for the plaintiffs:

\* \* The purchaser, who was the defendants' father, bought expressly subject to the annuity, and, therefore, is bound to

[ 299 ]

HARRISSON  
v.  
DUIGNAN.

indemnify Peter Kyne's assets. This question was much discussed in the case of *Jones v. Kearney* (1), and involves the principle upon which *Taylor v. Stibbert* (2) was decided. If the plaintiffs shall be only declared entitled to six years' arrear of this annuity, they will be driven to commence an action at law against the assets of Peter Kyne upon the covenant; and his representatives in their turn will be entitled to file a bill in this Court against the present defendants, to compel them to reimburse them what they shall have been thereby obliged to pay; thus that circuity of action will of necessity ensue, which this Court is always so anxious to guard against. In *Winter v. Innes* (3), Lord COTTENHAM following out this \*principle, seemed to be of opinion, that the representatives of a deceased partner could not set up a defence of the Statute of Limitations against a claim by a creditor of the firm, whilst the surviving partner continued liable, and the estate of the deceased partner might be obliged to contribute at the suit of the surviving partner. That goes to the full extent of the present case. Peter Kyne is primarily liable no doubt, but the present defendants are the parties, upon whom ultimately the burthen must fall.

[ \*300 ]

*Mr. Serjt. Warren, and Mr. H. G. Hughes, for the minor defendants, Duignans :*

\* \* In *Anon*, (4), Lord HARDWICKE said, "Though a receiver is appointed by this Court, yet that will not alter the possession of the estate in the person, who shall be found entitled at the time the receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute;" and this case \*and the principle were fully recognized by Lord ELDON in the case of *Gresley v. Adderley* (5). As to the second point, the covenant in the deed of February, 1828, was not made with Harrisson, the trustee, but with Bryan Kyne himself. This covenant could not have been sued upon, after the conviction of Bryan Kyne; why then should the defendants be called upon to indemnify the assets of Peter Kyne, against an obligation, which had ceased to create any liability? But even supposing that the effect of the covenant was to create a trust, how can the Court act in the absence of Peter Kyne's representative?

[ \*301 ]

(1) 58 R. R. 249 (1 Dr. & War. 134). 111.

(2) 2 R. R. 278 (2 Ves. Jr. 437).

(4) 2 Atk. 15.

(3) 48 R. R. 24 (4 My. & Cr. 101,

(5) 18 R. R. 146 (1 Swanst. 573).

at the plaintiffs would not be entitled to more than what  
 have offered them; for the forty-second section of the Statute  
 limitations limits the right to six years, even in the case of  
 stees.

HARRISSON  
 r.  
 DUGNAN.

Mr. *Coppinger* for another defendant.

LORD CHANCELLOR:

No questions of considerable importance have arisen in this  
 case. Upon the first, which relates to the Statute of Limitations,  
 I am clearly of opinion, that the appointment by the Court of a  
 receiver over the estate cannot be held to have varied the position of  
 parties under the statute. No such exception is to be found in  
 the statute, and this Court is not at liberty to introduce it; such  
 exception would be most mischievous; its effect would be to  
 place minors in a worse situation, because they were under the pro-  
 tection of the Court, than they otherwise would be; for so long as  
 the Court by its officer had possession of an estate incumbered with  
 the demands of creditors, the minors \*could derive no benefit under  
 the statute. But the enactments of the statute are general, and do  
 not exclude minors from their protection; for this too I have the  
 authority of Lord HARDWICKE (1) in a case that has never, that I am  
 aware of, been doubted, and the principle of which has been recog-  
 nized to a certain extent by Lord ELDON, in the case of *Gresley v.*  
*Widdley* (2), where he says, “The order appointing a receiver is for  
 the benefit of incumbrancers only so far as expressed to be for their  
 benefit, and only so far as they choose to avail themselves of it.  
 The Court would not deprive them of the advantage of their legal  
 estate; they might, perhaps, be obliged to come here to be  
 examined *pro interesse suo*; but this Court would not interfere  
 against them. But I apprehend that when the Court interposed to  
 receive the rents, beyond what was required for keeping down the  
 interest on incumbrances, all the surplus rents after payment of  
 interest were received for the benefit of the heir.”

[ \*302 ]

It is then said, that this case goes somewhat further, for that  
 upon the usual reference, which was made in the matter of the  
 minors, the Dugnans, to ascertain and report the nature and  
 amount of the property of the minors, the Master actually found in  
 his report, that the property of the minors was subject to this  
 annuity of 100*l.* for the life of Bryan Kyne. But this cannot alter

(1) *Anon*, 2 Atk. 15.

(2) 18 B. R. 150 (1 Swanst. 579).



HARRISSON  
v.  
DUIGNAN.

[ \*303 ]

the case. The question here is, have the plaintiffs themselves been guilty of *laches*, within the meaning of the statute. On this their rights altogether depend; and the circumstance of the Master having found the fact of the existence of such an annuity cannot vary the case. I am of opinion, therefore, \*that the bar of the statute operates, and that whatever benefit could have been derived from the statute, if the matter had not been within the administration of the Court, the minors are entitled to take, just as if the Court had never interfered; and, that therefore, the plaintiffs are not entitled to an account of the arrears of this annuity, for more than six years prior to the filing of the bill.

The second question is one of great importance. Peter Kyne, the person who granted the annuity out of the estate, also entered into a personal covenant with the cestui que trust to pay this annuity. This covenant, it is admitted, is not affected by the statute, and, therefore, if there are arrears, it may be acted on for their recovery. Peter Kyne sold the estate to Duignan, the person under whom the defendants claim. The conveyance to Duignan recites the intention to sell the property, subject to the deed of the 18th of February, 1828; "and whereas the said Peter Kyne had proposed absolutely to sell, grant, and convey, all his estate, right, title, term, and interest, in and to the said towns and lands, &c., subject to a use for the life of him the said Bryan Kyne, in and to the said dwelling-house and paddock of land adjoining the same, &c. &c., and also subject to the said annuity of 100*l.*, also granted to the said Edward Mills Harrisson, and his assigns, during the life of the said Bryan Kyne;" and then the conveyance is made to the purchaser, reserving the said dwelling-house and paddock of land during the life of Bryan Kyne, and subject expressly to the annuity of 100*l.*; and in the covenant of the seller against incumbrances, these very incumbrances are excepted. So that it is admitted, that the purchaser took the property subject to these incumbrances and charges created by the seller. It is much \*too late to dispute that the purchaser, and more particularly where he takes a conveyance in this form, is liable to the same extent as the seller was, and in the view of a court of equity, is bound, even without any covenant, to indemnify the seller against those incumbrances, subject to which he purchased. I treat the present defendants as if they were themselves the purchasers.

[ \*304 ]

But it is said that they are not bound by any supposed liability, which the seller may have imposed on himself by the personal

HARRISSON  
v.  
DUIGAN.

covenant in the deed of 1828. On the part of the plaintiffs it is argued, that the effect of the deed of conveyance of 1831, was to create a trust in favour of Bryan Kyne. I am clearly of opinion, that there was no trust created; there was an obligation imposed on the purchaser, which this Court would enforce; but the question, which arises, is, will the Court thus indirectly enforce this obligation, and thereby in effect evade the operation of the statute? The case of *Taylor v. Stibbert* (1) was very much doubted, and required explanation. In that case Lord Rosslyn held, that the purchaser was bound to execute the new lease with the former covenants *in totidem verbis*. The covenant bound the tenant for life, the seller; and the purchaser having bought with notice, was bound to the same extent. It was held, whether rightly or wrongly I am not here called upon to say, that the purchaser was only bound to do the very act, in relation to the estate, which the seller had covenanted to do. The obligation in the present case goes a little further; it is not only an obligation in reference to the estate itself, but Peter Kyne, the seller, has entered into a covenant also, and thus created a liability binding himself \*personally. The question then is, can I work out this liability as against the purchaser? If an action were brought against Peter Kyne, the seller, he might file a bill against the defendants, and claim the indemnity, which, by law, he is entitled to against the liability, subject to which, he had sold the estate. This is clear beyond all dispute. But can I now, to prevent circuity, enforce this claim, in the absence of Peter Kyne, against the defendants? No doubt there is an existing demand, and if Peter Kyne proved damages in consequence of that demand, it might be enforced against the defendants. But can I do so in the absence of Peter Kyne? I think it would be most dangerous to do so. I know not what may have taken place. Peter, himself, must tell me, that he is damnified. Generally speaking, this Court is bound to prevent circuity of action; but the charge in this case not being one on the estate at all, but merely a personal obligation, and no damage having been shown, I am not prepared to say that I can now give relief against a purchaser, precisely as if the Statute of Limitations had not barred the demand against the estate: it would be pushing the rule too far; I think the rule has already gone quite far enough. I give to the plaintiffs all the rights, they are at present entitled to against the estate. If that covenant be not barred, and the plaintiffs should enforce it against Peter Kyne, and

[ \*305 ]

(1) 2 B. R. 278 (2 Ves. Jr. 437).

SMITH  
v.  
CHICHESTER.

default of payment be sold, together with the term of years demised by the mortgage of 1814, and the proceeds thereof be applied in payment of the plaintiff's demand. There was a prayer of *subpoena* against Scott and Clayton, to bring in and lodge all deeds and papers relating to the said lands and premises.

Clayton answered this bill, and thereby stated that he and his partners had been the solicitors of Sir Arthur Chichester for a period of about seventeen years prior to the year 1835; that on the 24th of October, 1835, the said deed of the 1st of May, 1824, came into his possession for the purpose of negotiating a loan from the Globe Insurance Company to Sir Arthur Chichester, which loan was not carried into execution; that the deed had ever since remained in his possession; and that he claimed a lien thereon for costs on account of business done by the defendant for Sir A. Chichester.

[\*396]

On the 12th of November, 1839, the cause was heard, on which occasion a decretal order was pronounced, declaring \*that the lease of the 1st of May, 1824, was a graft upon the original lease of 1812, without prejudice to any question of priority between the plaintiff and defendants, or any creditors of the said Sir Arthur Chichester. It was thereby referred to the Master, to take an account of what was due to the plaintiff on foot of the mortgage of 1814, and of all prior and contemporaneous incumbrances; and also an account of what was due to the sub-mortgagees, Thomas Alexander, and Joseph Cochrane, and Samuel Cochrane, on foot of their securities; and also an account of what was due to Clayton by Sir A. Chichester, on foot of the costs in the pleadings mentioned. And it was also referred to the Master to report "whether the said defendant, Michael Clayton, had any and what lien as against the defendant, Sir Arthur Chichester, or any other, and what person, on the indenture of the 1st of May, 1824, in respect of such costs, and the nature of such lien, and the amount thereof."

On the 27th of April, 1842, the Master made his report, and thereby found the several sums due respectively to the plaintiff and the sub-mortgagees; and he found that there was due to the defendant, Clayton, on foot of the several taxed bills of costs, in the pleadings mentioned, for business done for Sir A. Chichester from and previous to the year 1827 down to September, 1837, the sum of 813*l.* 13*s.*; that the lease of the 1st of May, 1824, was handed by the defendant, Sir A. Chichester, to Clayton, as his attorney and solicitor, on the 24th of October, 1835; and the Master reported, that the defendant, Clayton, had not a lien for the amount of his

for himself for life, for his intended wife, and the issue of the marriage, and in default of issue, for himself absolutely. The son survived the father, and died in 1832, leaving issue one daughter only. The next tenant *quasi* in tail under the original settlement of 1767, filed his bill, claiming under the entail as still subsisting: Held, that by the operation of the deed of 1792, which was voidable only and not void, and which had been afterwards confirmed by the son by the effect of his subsequent dealings with the property, the *quasi* entail had been effectually barred.

ALLEN  
v.  
ALLEN.

By indenture bearing date the 4th of February, 1767, and made between Philip Allen [the elder] and William Allen [the elder] his eldest son, of the first part; Catherine Philpot, of the second part; Joseph Barry, and Joseph Collins, of the third part; and George Allen, and William Allen [the elder] of the fourth part; being the settlement, executed on the occasion \*of the marriage of William Allen, [the elder] and Catherine Philpot, the lands of Clontiforkill, Dromada, Colclougher, and Ballynakelly, situate in the county of Cork, and held under leases with covenants for perpetual renewal, and the lands of Milragh, in the same county, and which were held in fee simple, were conveyed to Barry and Collins, upon trust as to Colclougher and Ballynakelly, for Philip Allen [the elder] for life, with remainder to William [the elder] for life; and as to all the rest of the lands, for William [the elder] for life, remainder as to all, to trustees, to preserve contingent remainders, with remainder (subject to a jointure for the intended wife, and a sum of 1,500*l.* for the younger children of the marriage, and a term of 200 years for securing same), as to Colclougher and Ballynakelly, after the death of the survivor of them, the said Philip [the elder] and William Allen [the elder], and as to all the remaining lands, to the use of the first son of the marriage, and the heirs male of the body of said first son; with remainder to the second and other sons of the marriage successively, in tail male; with remainder to the daughters of the marriage, as tenants in common in tail male; with remainder for want of such issue, to the use of the right heirs and assigns of the said William Allen [the elder].

[ \*308 ]

The marriage was duly solemnized, and there was issue, several children, of whom Philip Allen [the younger] was the eldest, and William Allen [the younger] who was the plaintiff in the present cause, was the second son.

By indenture of the 17th of November, 1792, and made between the said William Allen [the elder] and Philip Allen [the younger], eldest son and heir apparent of said William Allen, of the one and William Aldworth Allen, of the other part; \*reciting the

[ \*309 ]

ALLEN  
r.  
ALLEN.

settlement of 1767, that Philip [the elder], the father of William [the elder], had died several years since, and that "Philip Allen [the younger], party thereto, was the eldest son of the said William [the elder], and Catherine, his wife, and that he had lately attained his age of 21 years;" and that he and his father had agreed to dock and bar all estates tail and reversions, or estates or terms in the nature of estates tail, or reversions in all the settled lands, and to settle same to the uses therein mentioned: William [the elder] and Philip [the younger] conveyed all the said lands to the said William Aldworth Allen, his heirs and assigns, to hold same (subject to the jointure for said Catherine Allen, and the term of 200 years) to the use of William Allen [the elder] for life: and from and immediately after the decease of the said William Allen (in case Philip Allen [the younger], his son, party thereto, should happen to survive him), upon trust, "for Philip [the younger], his heirs and assigns: but in case the said Philip Allen [the younger] shall happen to die in the life-time of his said father, the said William Allen [the elder], party hereto, without leaving any issue lawfully begotten, then, and in that case, the said several towns, lands, and premises, &c. &c., shall, from and immediately after the decease of the said Philip Allen [the younger] go and belong to the said William Allen [the elder], his heirs and assigns, to and for his and their sole and only use, benefit, and behoof."

By this deed, there was a power given to William [the elder] and Philip [the younger] jointly, to charge said lands, with a sum of 2,000*l.* and a like power to lease for any term, at the most improved yearly rent. There was contained in the deed, a power enabling William [the elder] and Philip [the younger], by any writing under their hands and seals, to revoke the uses thereby limited, and appoint new uses: and a covenant on the part of William [the elder] and Philip [the younger], to suffer a recovery and levy a fine, before the \*ensuing Michaelmas Term, to enure to the uses of the deed.

[ \*310 ]

By indenture of the 6th of June, 1795, and made between the said William Allen [the elder] of the one part, and Philip Allen [the younger] of the other part; William Allen [the elder] conveyed all the lands comprised in the settlement of 1767 to the said Philip Allen [the younger], his heirs and assigns, for all such estate or estates for lives or in fee, as the said William Allen [the elder] then had therein.

deed was not produced; it was stated to have been lost; having been registered shortly after the period of its execution, the contents, as above stated, are taken from the memorial.

Indenture of settlement, bearing date the 15th of April, 1806, made between the said William Allen, the elder, and Philip Allen [the younger], his eldest son, of the first part; William Allen, the

(the present plaintiff), of the second part; James Lowry Lowe, of the third part; Joseph Barry, and George Bond of the fourth part; and Duckett Mayberry and Christopher of the fifth part; being the settlement executed on the behalf of the said William Allen, the younger: reciting "that the said William Allen, the elder, and Philip Allen [the younger], one of them is, seised of an estate, or estates, for three lives or more, in fee simple, or in fee tail, or in fee simple absolute for ever, of and in the several farms and lands of Ballynakelly, Dromada," and others; and that the said Mary was entitled to a fortune of 1,200*l.*: the said deed witnessed, in consideration of the said sum of 1,200*l.* being paid to the said William Allen, the elder, at the desire, and by and with the consent of the said Philip Allen [the younger], and William Allen, the younger; and also in consideration of the said William Allen, the younger, releasing his right to any part of the sum of 1,500*l.*, provided for younger children by the original settlement of 1767, made by the said William Allen, the elder, and Philip [the younger], concerning the said lands of Ballynakelly and Dromada, and the premises, to Joseph Barry and George Bond Lowe, their heirs and assigns, "first, to the intent and purpose that all estates tail, and reversions, remainders, limitations, conditions, and contingencies therein respectively expectant, or depending in the said lands and premises, or any part or parts, parcel or parcels thereof, may, by virtue, or in pursuance of these presents, be barred, docked, extinguished and destroyed, to all intents and purposes:" and after the solemnization of the intended marriage, to the use of the said William Allen, the younger, for life, and after his decease, to secure a jointure of 150*l.* per annum for his intended wife; and subject thereto and to a term of 200 years for securing same, and also a sum of 2,000*l.* for younger children, to the use of the issue male of the marriage; and in failure of issue male of the said intended marriage, in trust, as to the said lands of Ballynakelly and Dromada, from and after the death of the said William Allen, the younger, to and for the use of the said William Allen, the elder, if then living, during his natural life; and from and after his

ALLEN  
v.  
ALLEN.

[ \*311 ]

ALLEN  
 v.  
 ALLEN.

[ \*315 ]

trustees during his life to preserve contingent remainders; and after the decease of Philip [the younger] to the intent, that the said Elizabeth Barry might receive for and during her natural life an annuity of 150*l.*, to be issuing out of the said lands, by way or in the nature of a jointure; and subject thereto, to the use of the said John Evans and George Baggs, for the term of 500 years, for better securing said jointure, and a sum of 1,500*l.* as the portions of the younger children; and subject thereto to the use of the first and other sons of the said marriage in tail male; and for default of such issue male, to the use of Philip Allen [the younger], his heirs and assigns for ever. There was contained in this deed a covenant on the part of Philip Allen [the younger], that he was seised of the said lands for "a good, true, absolute, and indefeasible estate of inheritance in reversion or remainder, expectant immediately on the determination of the estate, which his father William Allen [the elder], now of Greenfield, hath therein, for \*and during the term of his natural life only, without impeachment of, or for any manner of waste, or subject or liable to any condition, contingent proviso, limitation, of use or uses, or other restraint, matter, or thing, to determine or change the same."

This deed further witnessed, after reciting that Philip Allen [the younger], being only entitled to a reversionary interest in the said lands, expectant on the death of his father, and being, in consequence, unable to secure out of the said lands, to the said Elizabeth Barry, the jointure intended to be provided for her, unless in the event of his surviving his father, that it was agreed and covenanted that the sum of 500*l.*, the portion of the said Elizabeth Barry, should remain as a provision for her, in case the said Philip Allen [the younger] should happen to die in the life-time of the said William Allen [the elder]: Provided nevertheless, that it should and might be lawful for the said Philip Allen [the younger] during the life-time of the said William Allen [the elder], to receive and take to his own use the interest thereof, being 30*l.* per annum, on the days and times, upon which the same had hitherto been payable to the said Elizabeth Barry.

Of this marriage there was issue only one daughter, Elizabeth Allen, who was one of the defendants.

William Allen, the elder, died in May, 1823, and Philip Allen [the younger] died in the month of December, 1832, leaving his widow and only child him surviving. By his will, which bore date the 4th of January, 1827, and was duly executed for passing real

gave his daughter 2,000*l.*, and subject thereto he devised perty, real and personal, to his widow.

present bill was filed by William Allen, the younger, the son of Philip [the younger], claiming to be entitled to the property comprised in the settlement of 1767, on the ground that the entail created thereby was never effectually barred. The bill stated that the said Philip Allen [the younger] was under age, when he executed the deed of the 17th of November, 1792, notwithstanding the recital to the effect, that he had attained his full age; and that the deed was executed as a reason for not proceeding at law, that there had been renewals; that the term of 200 years in the settlement of 1767 was still outstanding; and that the lands in question were in the possession of a receiver appointed by this Court in a cause of *Tarrant v. Tarrant*, instituted by Tarrant, a judgment creditor of Philip Allen [the younger], for the purpose of raising the amount of his judgment.

The defendants insisted that the deed of the 17th of November, 1792, was in itself sufficient to bar the *quasi* entail; they also relied on the deed of the 7th of November, 1792; and said that, even if the deed of 1792 had been executed by Philip Allen, when under age, it was at most only voidable, and that the several subsequent deeds, which have been already fully stated, were in effect acts confirming the entail.

In addition to the deeds, which have been already mentioned, several renewals were also referred to. The first of these was a renewal of the lands of Clontiforkhill, of the 10th of March, 1775, granted to William Allen, the elder; a second renewal of the same lands, in 1793, was granted in like manner to William Allen [the elder]; and again, in 1802, a third renewal of the same lands to William Allen [the elder] also. When the bill was filed two of the lives named in this last renewal were still in existence.

The deed of the 6th of June, 1795, was not produced, and the only evidence which was given of it, was an attested copy of the memorial executed by the grantor, William Allen [the elder]; a consent had been entered into, admitting documents “(saving all parties all just exceptions thereto),” and, among others, “the attested copy of the memorial of the deed of 1795, executed by William Allen, the elder; and that the original deed had been lost, and that the same, or a copy thereof, could not be found.” On the part of the plaintiff an objection was made to the reception of the memorial; but the Court, however, was of opinion, that the parties had, by the terms of the consent, precluded themselves from making the objection.

ALLEN  
v.  
ALLEN.  
[ 316 ]

[ 317 ]



ALLEN  
v.  
ALLEN.

*Mr. Moore, Mr. Brooke, Mr. Collins, and Mr. W. H. Griffith,*  
for the plaintiff :

The entail created by the original settlement of 1767 is still subsisting, and has never been effectually barred ; and, such being the case, the present plaintiff is entitled to the property comprised in that settlement, his elder brother, Philip, having died without issue male. \* \* \*

[ 319 ]

Under a limitation of an estate *pur autre vie*, to a person and the heirs of his body, the heirs take, not as heirs, but as special occupants, designated to fill up the possession. The whole estate is vested in the tenant for life ; the remainderman has no legal estate ; he has but a contingency or possibility of succession. [On this point they cited *Slade v. Pattison* (1).]

[ 320 ]

*The Attorney-General, Mr. Serjt. Warren, Mr. T. B. C. Smith,*  
and *Mr. Franks*, for the defendants :

[ 321 ]

The deed of 1792, which it is admitted was executed by Philip Allen, when under age, was only voidable, and that upon the authority of *Zouch v. Parsons* (2). \* \* By the subsequent deed of 1811, Philip and his father William exercised the power of revocation contained in the deed of 1792 ; and thereby, notwithstanding what has been said, treated the deed as a valid and subsisting instrument, and thus in effect confirmed it. \* \* \*

[ 322 ]

By the deed of 1815, Philip was under a contract to bar the entail and settle the lands to the uses of that settlement. After his father's death, he had full and absolute power to effectuate all this. In this Court, therefore, he must be considered as having actually so done, and it would be a strong measure for the Court now to interpose in favour of the plaintiffs, \*against a purchaser for value, and one who has besides the legal estate.

[ \*323 ]

*Mr. Collins*, in reply. \* \* \*

[Other cases cited by counsel are referred to in the following judgment.]

May 7.

THE LORD CHANCELLOR :

[ 324 ]

The first question is, whether the settlement of 1815, entered into by the *quasi* tenant in tail in remainder, under the previous settlement of 1767, was sufficient to bar that estate tail and the

(1) 14 L. J. Ch. 52.

(2) 3 Burr. 1794.

ent remainders; the prior tenant for life not having joined deed. The settlor in the settlement of 1815 has died issue male, but leaving a daughter, against whom the bill is filed by the remainderman under the settlement of who now alleges that his remainder has not been effectually

ALLEN  
v.  
ALLEN.

is surprised to find, from the arguments of the Bar, that so doubt still exists as to the power of alienation of a *quasi* t in tail over leaseholds for lives, particularly when we con- the vast extent of that tenure in this country. From the importance of the subject, I have been induced to look igh the authorities with some attention. If the settlement of was binding, although executed by the *quasi* tenant in tail in nder, I am not bound to consider the other questions in cause.

*quasi* tenant in tail in remainder has, strictly speaking, no te; he has a mere expectancy of filling up, by special occupancy, vacancy upon the death of the tenant for life, which, if there e no special occupant, would be the subject of general occupancy. t this interest (in a sense which is very well understood) is nmissible and disposable; so that we are all in the habit of aking of a vested estate *quasi* in tail in remainder, just as we do a vested estate in tail in remainder in lands of inheritance. It ems to have been the opinion of Lord NORTHINGTON, that a *quasi* nant in tail was entitled to the absolute interest upon the birth of sue. In *Grey v. Mannock* (1), he is reported to have said, "that e person, who would have been tenant in tail, had it been an inheritance, is entitled to the absolute ownership," comparing it o the case at common law of a conditional fee, which became absolute by the party's having issue. I at first thought this was a mistake of the reporter; and that the learned Judge probably meant, that a power of alienation would spring up upon the birth of issue, even in favour of a remainderman *quasi* in tail. However comparing that report with Lord KENYON's note in *Doe v. Luxton* (2), I find both accurately agree. The observation may probably refer to the circumstance of the renewal. At all events, there is no doubt that the *quasi* tenant in tail must do some act to bar the entail, and the remainders over; and it is not a necessary condition, that the *quasi* tenant in tail should have issue born at the time or afterwards, in order to give effect to his disposition. Such an interest

[ 325 ]

(1) 2 Eden, 339.

(2) 6 T. R. 293.

ALLEN  
c.  
ALLEN.

[ \*326 ]

cannot be compared with a fee simple conditional. A *quasi* tenant in tail does not take the absolute interest upon the birth of issue, or obtain by such birth any greater right of alienation, than he \*had before; whereas, the donee of a fee simple conditional, as soon as he had performed the condition, by having issue, was enabled to alien, and thereby bar the donor of his reversion. But the *quasi* tenant in tail may defeat the settlement by alienation before issue born, provided it be by an act *inter vivos*. I quite agree with the authorities, which have decided, that a mere will is not sufficient.

[ \*327 ]

Mr. Webb, the great conveyancer of his day, thought that no remainder could be limited after a *quasi* estate tail (1); I am not surprised at that opinion, the grounds of which appear to me to have much weight; but the law has been settled the other way by the case of *Wastneys v. Chappel* (2). On the other hand, Lord TALBOT, in *Low v. Burron* (3), thought that the remainders so limited after a *quasi* estate tail, were not merely good, but that there was no act, which the *quasi* tenant in tail could do, that would be capable of barring these remainders over, and that that point was settled by the case in the House of Lords. That case, however, only decided, that a *quasi* tenant in tail in remainder cannot, without the concurrence of the tenant for life, bar the remainders over, and it is now beyond dispute, that the remainders may be barred by any disposition *inter vivos* of the *quasi* tenant in tail in possession, or of the *quasi* tenant in tail in remainder with the concurrence of the tenant for life. These are now settled points. In *Ex parte Sterne* (4), the MASTER OF THE ROLLS raised questions as to the effect of limitations of life estates, with remainders to the heirs of the body of the tenant for life, in property of this nature. He seems to have thought, that it was doubtful, whether the estate for life and the estate in remainder \*could unite together in the same manner, as they would in the case of lands of inheritance. For this doubt I cannot think that there is any foundation, and I do not consider it advisable to raise questions upon the effect of such limitations, arising out of the peculiar nature of the property in question. The analogy with fee simple estates ought to be supported as far as it can be. I may observe, that I do not quarrel with the case of *Doe v. Robinson* (5), which has been the subject of so much criticism at the Bar. That case, fairly following the

(1) 3 P. Wms. 263, n.

(2) 3 Br. P. C. 53, Toml. ed.

(3) 3 P. Wms. 262.

(4) 6 Ves. 156.

(5) 8 B. & C. 296; 2 Man. & Ry.  
249.

analogy to the rule of law as to estates of inheritance, decided, that without words showing an intention to give more than a life estate, a devisee of an estate *pur auter vie* takes only for his own life. That decision is in my opinion quite right, although it has been much observed upon (1).

ALLEN  
v.  
ALLEN.

It is settled then, that a *quasi* tenant in tail in possession has complete power over the estate to bar the entail and the remainders over. He may by any act *inter vivos* deal with the estate, precisely as if there never had been any settlement. No technicalities are required. He need not declare his intention of barring the *quasi* entail. It is sufficient if he do any act, which would vest in him a new or different estate. The existence of prior incumbrances creates no impediment; he, therefore, for the purposes of alienation, stands in the position of a person, who has the whole estate and the absolute dominion. In *Norton v. Frecker* (2), Lord HARDWICKE, speaking of such an estate, says, that the limitations depending on the estate of the first taker in tail are entirely in his power, and may be destroyed “by even articles in \*equity. By this Lord HARDWICKE means, that the estate would be bound, into whomsoever’s hands the property passed, for of course every man is bound by his own contract. It has been argued, that it is the same, as to a contract by a tenant in tail in remainder, if he afterwards comes into possession of the property, so as to have the absolute power of disposition: but it is not necessary for me to give any opinion on that point. In *Baker v. Bayley* (3), it was held, that a mere renewal, by the *quasi* tenant [in] tail in possession, barred the estates in remainder, and gave to the party who effected it, a new estate discharged of the former limitations. In *Grey v. Mannock* (4), already referred to, although the reasoning of Lord NORTHINGTON may not be free from objection, yet the point decided was exactly the same. There was a surrender of the old lease, and the acquisition of a new one, and this was held to bar the limitations over, so that the ground of the decision was, the entire change of estate.

[ \*328 ]

The same point was also decided in *Blake v. Blake*. This case is to be found in three different stages. It is first reported in the first volume of Mr. Cox’s Reports (5), and in a note in the third volume of Peere Williams (6). There there was a devise of a lease

(1) 2 Man. & Ry. 249, *n*.

(2) 1 Atk. 525.

(3) 2 Vern. 225.

(4) 2 Eden, 339.

(5) 1 R. R. 35 (1 Cox, 266).

(6) 3 P. Wms. 10, *n*.

ALLEN  
v.  
ALLEN.

[ \*329 ]

*pur auter vie* in trust for Robert Blake and the heirs male of his body, and in case he should die without issue, for the plaintiff in like manner. Robert surrendered the old lease, and obtained a new one without the concurrence of the trustees, and subsequently died, without issue, having by his will disposed of the property. On a bill filed by the plaintiff against the representatives of \*Robert, claiming the benefit of the new lease, the Court held, that Robert could not have been called upon to have declared such a trust in his life-time, and that there existed no stronger equity against his representatives. He had gained at law the whole estate; an estate different from that which he took under his father's will, and there was no equity for the remainderman, notwithstanding the trustees did not concur in the renewal. In *Campbell v. Sandys* (1), Lord REDESDALE said, "the whole argument turned on the fact of the surrender of the lease and the grant of a new lease to the *quasi* tenant in tail; and this was held to bar, because the estate was altered: the *quasi* tenant in tail had gained the absolute interest at law, and there was no equity to constitute him a trustee for his own issue or for the remainderman;" and Lord ELDON, in *Lloyd v. Johns* (2), said, "the ground of that decision was, that the equity attaching upon the renewed lease being one, which could be discharged by a mere deed, the Court would not call upon the lessee to make a settlement, which he might undo at the same moment;" and he had before made a similar observation in *Lord Dursley v. Fitzhardinge* (3).

[ \*330 ]

The case came on afterwards at law, under the name of *Doe v. Luxton* (4), upon an ejectment by the party, who had been plaintiff in equity; one of the lives in the original lease being still in existence; Lord KENYON decided against him, principally upon the ground, that the legal estate was outstanding in the trustees of the will; but he seemed inclined to consider, that a surrender from those trustees might be presumed in favour of the defendant, which point, if it \*should arise, may require further consideration, for under the circumstances, such a surrender would, I apprehend, have been a breach of trust.

Afterwards, all the lives in the original lease having expired, the case came on before Sir Thomas Plumer, under the name of *Blake v. Luxton* (5). A new bill had been filed, and it was insisted, that

(1) 9 R. R. 34 (1 Sch. & Lef. 295).

(2) 7 R. R. 147 (9 Ves. 63).

(3) 5 R. R. 290 (6 Ves. 262).

(4) 6 T. R. 289.

(5) 14 R. R. 235 (G. Coop. 178).

ALLEN  
C.  
ALLEN.

there were existing interests, and prior incumbrances, at the period of the surrender, which would be sufficient to prevent the destruction of the *quasi* entail, created by the original will. This involved all the difficulties, which have now been pressed upon me in argument. There were lives in being in the old lease, when the new one was obtained; the old trustees did not concur; therefore, in fact, the new lease was in point of law only a lease in remainder, expectant on the determination of the lives in the first lease. There were trustees, prior interests, incumbrances of all sorts. It was, therefore, contended, that the *quasi* tenant in tail could not, by any act of his, destroy the settlement. The original lease was not touched by the new lease, and looking at it technically, and as a matter of strict conveyancing, the argument was a sound one, for there was no surrender by the trustees, and it was difficult to say, that the acceptance of a new lease by a party, in whom the old lease was not vested, determined a settlement of the old lease; nevertheless, the Court held, that the remainder of the plaintiff in that case was barred, and accordingly dismissed his bill. I approve of the decisions in the several branches of that case. I think the conclusion arrived at a wise and a safe one. The Court cast aside all idle technicalities, and laid down a plain and intelligible \*rule; to inquire, not whether there has been any division of the interest under the old lease, but simply, whether the party, who accepted the new lease, had a disposable power, when he did that act; and although the interest newly acquired by the *quasi* tenant in tail may not be commensurate with his equitable title under the old lease, nevertheless, the exercise of his right of ownership is sufficient to put an end to the *quasi* entail.

[ \*331 ]

In a case (1) where the first tenant in tail of such an estate, which he took subject to a mortgage, joined with the mortgagee in assignment to another person, subject to the old equity of redemption, Mr. Fearne admitted, that a question might have been made, whether the tenant in tail's concurrence in such an assignment, barely to pay off the mortgage money, would have amounted to such a disposition, as would bar the entail. But he was clearly of opinion, that if the consideration, for securing of which the assignment was made, did not consist wholly of principal money, then due upon the old mortgage made by the testator, but included some arrears of interest due upon the principal money, owing upon the old mortgage, when the account was stated, the

(1) Fearne's Executory Devises, by Powell, vol. ii. p. 322, n.

ALLEN  
c.  
ALLEN.

[ \*332 ]

turning of this interest into principal, and thereby increasing the sum charged upon the lands, was in fact the creation of a new equity of redemption, and consequently amounted to an act of ownership exercised over the whole estate, and, therefore, effected a bar. The principle of the decisions, to which I have referred, governed also the cases of *Cann v. Cann* (1), *Dunn v. \*Green* (2), and *Challoner v. Murhall* (3), although there are distinctions between the two classes of cases, which I will not now stop to trace.

But the case of a *quasi* tenant in tail in remainder involves very different considerations. I observe that in Mr. Hayes's Conveyancing, to which I was referred, certain opinions are mentioned, and among others, one of mine, to the effect, that the concurrence of the tenant for life was necessary to enable the *quasi* tenant in tail in remainder to bar those claiming subsequent estates; and that was my opinion when at the Bar, not upon any strained analogy to the technical rule, which required that there should be a tenant to the *præcipe*, in order to defeat subsequent remainders in the case of estates tail in lands of inheritance; but upon this plain ground, viz., the solid advantage secured by the check, which is thus given to a tenant for life over those in remainder, and which every parent ought to possess over any alienation by *quasi* tenants in tail, before they come into the possession of the estate; thus following the analogy to fee simple estates, as far as it was beneficial.

[ \*333 ]

As to the authorities, the case of *Wastneys v. Chappel* (4) is an express authority, not impliedly, but directly deciding the very point, that the concurrence of the tenant for life in the conveyance is necessary to enable the *quasi* tenant in tail in remainder to bar the subsequent limitations. *The Duke of Grafton v. Hanmer* (5), decided the same point; there a testator had devised certain property held for three lives to the Duchess of Grafton for life, with remainder to \*the Duke, with remainder to his first and other sons by the Duchess in tail male, with remainders over. The Duke having died, a bill was filed by his son, praying, that the lives might be renewed, and settled on the Duchess for life, with remainder to the plaintiff and his heirs. The Court was of opinion, that this could not be done till a fine had been levied by the Duchess, and her second husband, Sir Thomas Hanmer; and it subsequently appearing, that a fine had been levied, the Court

(1) 1 Vern. 480.

(2) 3 P. Wms. 10.

(3) 3 R. R. 1 (2 Ves. Jr. 524).

(4) 3 Br. P. C. 53, Toml. ed.

(5) 3 P. Wms. 266, n.

ALLEN  
v.  
ALLEN.

ordered a new settlement to be executed accordingly. The Court, by directing the tenant for life to join, plainly showed its opinion, that without such concurrence the new settlement by the *quasi* tenant in tail in remainder would have been ineffectual. In *Forster v. Forster* (1) there are some very important observations by Lord HARDWICKE. He said, "as tenant for life and the person in remainder, in nature of a tenant in tail of a freehold lease, could certainly join and bar the settlement; so the same person, who had both these interests in himself, might also bar the entail of the freehold lease;" and again, "suppose a second son, tenant for life of such a freehold lease, remainder to the heirs of the body of the father, the tenant for life, and the elder brother, the heir male of the father, might certainly bar the entail, and, therefore, where the same right is in one and the same person, he could certainly do it." There is in fact no check; and the party may deal with the estate as he pleases, just as if he were tenant in tail in possession.

In *Norton v. Frecker* (2), with which I wish to express my entire satisfaction, Lord HARDWICKE decided, that a conveyance by a tenant for life, with the concurrence of the remainderman, barred the entail, although the remainderman \*did not actually join as a conveying party in the deed. In that case, the father was tenant for life, and the son tenant in tail, and on the son's marriage a deed was executed, whereby the father, conformably to certain articles, previously entered into by the son, settled the estate to certain uses in favour of himself, and his son and his issue. The son executed the deed, and afterwards died without issue; and Lord HARDWICKE said, "that the deed of 1673 amounted to a good disposition by the son of all the interest claimable by him, or any other in remainder after him, the tenant for life, and the remainderman in tail of an interest vested, having joined in the conveyance, and limited the estate to other uses." The son, the *quasi* tenant in tail in remainder, was an executing party, but the father alone conveyed. The son had in point of law only an expectancy, and his concurrence in the deed was tantamount to a conveyance. The Court regarded the real nature and substance of the transaction. There is some inaccuracy in the report, principally in the names of the children, but that does not affect the soundness or principle of the decision.

[ \*334 ]

These cases, therefore, seem to me to have placed the point beyond

(1) 2 Atk. 259.

(2) 1 Atk. 524; West, 203.



ALLEN  
v.  
ALLEN.

doubt. However, it appears, that a difference of opinion still prevailed, and the question was again raised in the case of *Slade v. Pattison* (1), which first came before Sir John Leach, and subsequently on appeal before the Lords Commissioners; and on both occasions it was held, that the concurrence of the tenant for life was necessary to render a conveyance by a *quasi* tenant in tail in remainder effectual to bar the remainders over. This decision

[ \*335 ]

I concur in, but not on mere technical grounds; and I hope \*that nothing will ever lead the Courts to hold that a technical mode of conveyance is necessary for such purpose, or to pursue any further the analogy to estates in fee simple. I should, without the least difficulty, decide the converse of *Norton v. Frecker*, namely, that a conveyance by a son, *quasi* tenant in tail in remainder, the father, the tenant for life, executing the deed, though not actually conveying, was a perfect bar to the entail and the remainders over.

In the report of the case of *Slade v. Pattison* (2), there appears to be some mistake. Sir LAUNCELOT SHADWELL, in delivering judgment upon the appeal, is made to say, "In *White v. White* (3), it was asserted in argument, that no alienation by the *quasi* tenant in tail would bar the ultimate remainders, unless he be in possession, or have the concurrence of the tenant for life; and although that was not the exact point then before the Court, yet Lord LOUGHBOROUGH (Lord ALVANLEY), in his judgment, appears to have decided the case upon this view of the question, and on appeal (4), Lord ELDON confirmed that decision." And again, Mr. Justice BOSANQUET is represented to have said, "the question, whether a *quasi* tenant in tail in remainder had power to bar the reversion, without the concurrence of the tenant for life, was adverted to in the case of *White v. White*; but no express opinion upon the subject is to be found in the judgment of the MASTER OF THE ROLLS." Now, on the contrary, Lord ALVANLEY, expressly stated (5), "I shall order the estate to be barred, a surrender to be made, and the new lease to be to the defendant for life, remainder to the plaintiff and his heirs; for I think the reversion may be barred \*without the concurrence of the tenant for life." That was a bill for a renewal by a devisee in tail in remainder, against the tenant for life, who was also entitled to the ultimate reversion. Lord ALVANLEY, at first, gave a clear

[ \*336 ]

(1) 14 L. J. Ch. 51.

(2) 14 L. J. Ch. 56.

(3) 4 R. R. 161 (4 Ves. 24).

(4) 4 R. R. 175 (9 Ves. 554).

(5) 4 R. R. 169 (4 Ves. 32).

ALLEN  
v.  
ALLEN.

opinion, that this ultimate reversion could be barred by the *quasi* tenant in tail in remainder, without the concurrence of the tenant for life, and the minutes were at first drawn up on this principle. It appears, however, from the report, "that the counsel for the defendant being dissatisfied with the minutes, thus drawn up, as in the latter case, it would bar the defendant's reversion; the MASTER OF THE ROLLS seemed inclined to think it should have that effect, but said he would write down the minutes himself;" and it appears by the minutes, thus prepared by himself, that he directed the new lease to be limited to the remainderman in tail; so that at last Lord ALVANLEY appears to have changed his opinion, and left the limitations in the settlement untouched.

That concludes the law upon this point: but before I leave this part of the case, I wish to refer to an observation of Mr. Justice BOSANQUET, at the close of his judgment, where when speaking of the want of power of barring estates of this nature by a will, which, as it cannot operate until after the death of the testator, cannot, therefore, divest the estate, he says: "now if the divesting of the estate be necessary to effect the bar, it may be argued with equal reason, that the sole act of a remainderman cannot divest an estate, over which he has never acquired any dominion." I cannot think that the doctrine of divesting of estates has any bearing upon the question, whether the *quasi* entail, in this species of property, has been barred or not? The conveyance of the tenant for life could not operate \*to divest any estates, and if a divesting were necessary, even his concurrence could not effect that object. But that is not the principle upon which the bar depends. Upon this part of the case I am of opinion, that the settlement of 1815, by the *quasi* tenant in tail in remainder, without the concurrence of the tenant for life, did not bind this estate, so as to bar the subsequent remainders, and, therefore, it becomes necessary to consider the other points in the case.

[ \*337 ]

But, before I proceed to consider them, I wish to make an observation upon a matter, which might be the subject of controversy. A *quasi* tenant in tail ought, in analogy to the rule which prevails in the case of estates of inheritance, to have power to bar himself and his issue, without the concurrence of the tenant for life. To hold otherwise, would be, to reject the analogy, and put a greater check on the power of alienation over an estate of this nature, than exists in the case of estates of inheritance, and without any corresponding advantage. It was argued, that the settlement of 1815, being a

ALLEN  
v.  
ALLEN.

contract, and there can be no doubt that it was, and something more than a mere contract; it was a contract executed, an actual conveyance, and being for valuable consideration, would bind the issue; and that as Philip survived his father, the tenant for life, and therefore lived until a period, at which he was clearly capable of barring the entail, the settlement ought to be taken to have had that operation. It reminds me of the case, where a man having a power to charge a jointure, when in possession of an estate, covenanted, during the life of a prior tenant for life, to exercise that power, and having survived the prior tenant, and acquired the capacity of performing his contract, was held bound thereby; and a court of equity, even against a remainderman, treated the power as if actually executed. But as there \*are other grounds, I shall decline to decide that question, or even to give any opinion upon it.

[ \*338 ]

The first of the remaining questions is, was the deed of the 17th of November, 1792, executed by the father and son, shortly before the son came of age, void absolutely as to the son, so as not to admit of confirmation, or was it only voidable? And secondly, if only voidable, did the son do any act subsequently, amounting to a confirmation of it? In the case of *Zouch v. Parsons* (1), it was decided, that deeds of this nature, executed by an infant, are voidable only, and not void. That decision has never been overruled; but I am asked now, after the lapse of nearly half a century, to overrule it: I do not conceive I have power to do so. I must decide legal points according to law; and, although I am bound to decide according to my conscience, and may differ from the certificate of a court of law, if I believe it to be wrong, yet I am not at liberty to overrule the solemn decision of a court of law, which has been acquiesced in for so many years, merely upon my own opinion, without taking steps to ascertain, what is now the doctrine of a court of law on the point. But I am relieved from any difficulty on the subject, as I am clearly of opinion, that *Zouch v. Parsons* is good law. I am told, that the case has been questioned by Mr. Preston, and that he states in his Treatise on Conveyancing, that Lord ELDON had frequently disapproved of it. I, myself, have no recollection of Lord ELDON's ever having expressed that opinion. It is highly probable, that Mr. Preston, entertaining as he did, a very strong opinion against the case, may have, in argument, pressed his views upon Lord ELDON, with that ability and earnestness, for \*which he was so remarkable, and that Lord ELDON may have

[ \*339 ]

(1) 3 Burr. 1794.

appeared to acquiesce. But Lord ELDON, when *Zouch v. Parsons* came judicially before him, in — *v. Hancock* (1), expressly adopted and acted upon, that case, without expressing the slightest disapprobation. *Zouch v. Parsons* came to be doubted as law, because conveyancers could not rely on it, as enabling a title to be made under a conveyance from an infant. For my own part, I always rejected a title which was to depend on the act of an infant, for at best the deed would be voidable: *Zouch v. Parsons* is no authority for saying that a good title can be made through a conveyance by an infant; but it is a totally different thing to say, that as a decision it is not sound law. In the argument before me there was some discussion as to the meaning of the passages in Perkins, and it was insisted that Lord MANSFIELD misunderstood the sections of Perkins, which relate to this subject. I think Lord MANSFIELD rightly understood Perkins, whose language on the subject could not be more explicit. He lays it down distinctly, that whenever a deed operates by delivery of the infant's hand merely, then it is only voidable; but whenever the deed does not take effect by delivery merely, but requires an additional ceremony, in these cases all such deeds are absolutely void; so that Perkins is a direct authority in support of *Zouch v. Parsons*. A lease executed by an infant, with a reservation of rent, is only voidable. It cannot, therefore, be said, that all instruments executed by infants are void; for here is a class of instruments, leases reserving rent, which, it must be admitted, are only voidable. Lord MANSFIELD, in the case of *Zouch v. Parsons*, seems to find fault with the distinction, \*that a lease without a rent is void, while a lease reserving rent is voidable only. And in Bacon's Abridgement (2), there is a very elaborate discussion to prove that that distinction ought not to be maintained; but that the principle, whereby a lease with a reservation of rents is held to be voidable only, ought to apply to the case of a lease without a rent, or with a nominal rent. As far as the authorities go, I am not aware of any case in which *Zouch v. Parsons* has been questioned; the case I have never heard impugned in any court of justice; and if I were now at liberty to overrule that decision, I should find it difficult to lay down a better rule. The principle established cannot do any harm. If an infant has executed a deed, which proves to be injurious to his interests, it is voidable, and he may set it aside when he attains his full age.

ALLEN  
v.  
ALLEN.

[ \*340 ]

(1) 17 Ves. 383.

(2) Tit. Infancy, (I. 3).

ALLEN  
 v.  
 ALLEN.

If *Zouch v. Parsons* had been so much disapproved of, as was alleged at the Bar, the fact could not have been unknown to Mr. Hargrave and Mr. Butler, when they annotated Coke upon Littleton. But in a note (1) by Mr. Hargrave, he said, "But see the case of *Zouch v. Parsons*, where Lord MANSFIELD, in delivering the opinion of the Court, seems to incline strongly in favour of construing an infant's surrender, if made by deed, as voidable only. In *Zouch v. Parsons* it became necessary to consider what was the true ground for holding the acts of infants as voidable only, whether the solemnity of the instrument, or the semblance of benefit to the infant on the face of the deed. As to the former ground, the Court thought fit to approve of Mr. Perkins' distinction, according to which, all such grants, gifts, or deeds of an infant, as do not take effect by delivery of his hand, are void, and those which do are voidable. \*See Perkins, section 12. But the Court decided the case principally on the latter ground; and held, a lease and release by an infant to be voidable, because the consideration of the conveyance, and other circumstances, showed, that the act was right and proper, and apparently not in the least to his prejudice." So that Mr. Hargrave had no idea that Lord MANSFIELD had misunderstood Perkins, or had decided against his authority. Mr. Butler, in a subsequent note (2), observed, "this, and many other passages in this work, respecting the operation and force of the acts of infants, were fully considered in the case of *Zouch v. Parsons*, and *May v. Hook*, heard before Lord Chancellor Bathurst, in 1778." It never occurred to these eminent men that there was any objection to the doctrine in *Zouch v. Parsons*; they intimate no disapprobation of it, and if it had been impugned, they surely must have heard of the decision. I am not at all apprehensive of the dangers, with which we have been threatened in argument at the Bar, unless *Zouch v. Parsons* be overruled. I am of opinion, that the deed of 1792 was voidable only. If I am to put my decision on the ground of the benefit arising to the infant from the deed, there is not only such a semblance of benefit, but so much real benefit conferred upon the infant, as to bring the case within that branch of the rule laid down by Lord MANSFIELD, in *Zouch v. Parsons*; for by the deed a remainder is limited to the son absolutely.

But it is said, that there is a proviso, that if Philip should, in his father's life-time, die without issue, the property was to go to his

(1) Co. Litt. 31 b (n. 3.).

(2) Co. Litt. 246 a (n. 1).

[ \*341 ]

father; and I am told that this was not beneficial to the son; for had he died in the life-time of his father, and without issue, he would not have derived \*any benefit from the settlement. But can such an argument be maintained? The son was tenant *quasi* in tail in remainder after his father's life estate; he could not, therefore, during the life-time of his father, without his concurrence, bar the ultimate remainders; he could not have made the settlement of 1815 without his father's assent; whereas, in consequence of the settlement of 1792, which it has been said was not beneficial, he was enabled to make the settlement of 1815, and thus provide for his wife and family. That was a substantial benefit conferred on him by the deed of 1792, while, on the other hand, that instrument took nothing from him. Suppose that the deed of 1792 had never been executed, and that the son had died in his father's life-time without issue male, what benefit, let me ask, could he in that case have derived from the estate? Upon this ground, therefore, also, I am justified in holding, that the settlement was only voidable. What still more establishes the propriety of the rule, in a case like the present, is this, that the father, the adult party, was clearly bound by that deed.

ALLEN  
G.  
ALLEN.  
[ \*342 ]

The settlement of 1792, being merely a voidable instrument, I must inquire whether the son has done any subsequent act to confirm it, since he came of age? Now, putting out of view for the present, the deed of 1795, let us look at the subsequent deeds in the case. There is, first, the deed of 1806, executed upon the marriage of the present plaintiff, William Allen, the younger, the next brother of Philip. In that deed it is recited, that William Allen, the elder, and Philip Allen, are, or one of them is, seised of an estate for three lives, renewable for ever; and throughout that settlement, the estate is treated as if William and Philip had the absolute ownership; and though, no doubt, as it was observed in the argument, there is, in that deed, this \*passage, "to the intent and purpose, that all estates tail, and *quasi* estates tail, remainders, &c. therein respectively expectant or depending in the said lands and premises, may be barred, &c." treating the *quasi* entail, as if it was still subsisting; yet these are only the common words inserted by every conveyancer, *ex abundanti cautela*: and to use those common drag-net words, in order to show that there was, at that time, a subsisting entail, would be mischievous in the extreme. But besides, that deed was one for value, the lady's fortune was paid to the father, and, by that deed, a portion of the lands

[ \*343 ]

ALLEN  
 v.  
 ALLEN.

comprized in the original deed of 1767 was conveyed to the plaintiff, and he, by that deed, released the residue of the lands from his share of the portion provided for the younger children, under the deed of 1767. To this extent, therefore, there was a benefit conferred upon Philip, by this deed of 1806, and even upon that slight benefit, provided in a deed consistent with the deed of 1792, I should hold, that the deed of 1806 amounted to a confirmation of the prior deed. Looking at the general frame and object of the deed of 1806, I should say, that the father and son were acting on the absolute ownership of the property, and dealing with it, as if they had the whole interest between them, which could only have been with reference to the deed of 1792.

We come next to the deed of 1811, which was executed with a view to the sale of a portion of the lands comprised in the deed of 1792, and which sale subsequently took place. There was some criticism upon the mode in which the settlement of 1792 was recited in this deed. It was said, that this settlement was not recited directly like the other deeds, but that the recital introduces the words, "it was witnessed, &c." But that was exactly in accordance with the settled distinction in the form of recitals: where a deed was recited \*without any reference to any of the recitals contained in it, it was stated simply, "whereas by such a deed, such a thing was done." But where the recitals of the deed in recital were introduced, they were closed with the formal words, "it was witnessed." Now, this was precisely the form adopted in the deed of 1811; it is nothing but form, and the observations, which have been made on it, are not entitled to any weight.

[ \*344 ]

By the deed of 1811, the settlement of 1792 is recited, as a binding legal instrument. What can be a confirmation of a voidable instrument, if this be not? A father and son execute a settlement, which, as against the son, he being under age at the time, is voidable, although it is binding on the father and the other adult parties; and then, several years afterwards, and when the son has attained his full age, he executes another deed, in which is recited this very settlement, and an act is done under that instrument, for in the settlement of 1792 there is contained a power to revoke the uses thereby declared, and limit new uses; and by this deed of 1811 that power is exercised as to a portion of the lands. The deed of 1811 was, therefore, an act done under the settlement of 1792. But it was said at the Bar, that by this latter deed, so far as it operated,

Philip did an act, not to confirm, but virtually to defeat the settlement of 1792. No doubt, such is the operation of that deed, but that is not the question. I am not to consider, whether the effect was to defeat the settlement of 1792, or not, but whether it was an act done under that settlement, as a binding and valid instrument. It cannot be maintained, that because the power was a power of revocation, the exercise of it was a repudiation, and not a confirmation, of the settlement. By the deed in the same year, which follows, the lands, which were comprised in the deed \*of 1811, were conveyed to a purchaser, and which deed was, in fact, previously executed, in order to enable a good title to be made to the purchaser. This is another act of confirmation. I have read every word of the several instruments with the utmost care, and I am clearly of opinion, that they constitute a complete and perfect case of confirmation of the settlement of 1792.

ALLEN  
v.  
ALLEN.

[ \*345 ]

I now again revert to the marriage settlement of 1815; by that deed Philip Allen actually conveys the property as if it were his own, for the purpose of making a provision for his wife and children. Can I look upon this deed in any other light than as a confirmation of the settlement of 1792? There is no magic in the word "confirmation." Would it have been consistent with his previous acts, if Philip Allen, who thus conveyed the property, had afterwards repudiated the settlement of 1792, which alone gave him the power of effectually making that conveyance? The confirmation of the settlement of 1792 was essential to the validity of the deed of 1815. How then can I be asked to disturb the arrangement, which he made on the solemn occasion of his marriage, for his wife and children? and to defeat it on the ground that it was not a confirmation, but a repudiation of the prior settlement of 1792, when the repudiation of that settlement would render the marriage settlement a nullity? Must I not look upon Philip Allen, when he executed the settlement of 1815, as doing that other act, which he had the full power to do, and which was necessary to the validity of that settlement, namely, the confirmation of the settlement of 1792? I do not think that the recital and provision as to the lady's fortune, at the latter end of the deed of 1815, militates against this view; and I am of opinion, that this settlement of 1815, \*supposing it stood alone, was a direct confirmation of the settlement of 1792. I may observe as to this doctrine of confirmation, that as the settlement of 1792 was voidable only, it required to be avoided; it was good until

[ \*346 ]



ALLEN  
v.  
ALLEN.

some act was done to repudiate it. It is not sufficient for those, who claim in opposition to it, to say, that no act was done to confirm it. They must go a step further, and show that an act was done to avoid it. Here no such act has been shown, but on the contrary, there has been an acquiescence by the party during his whole life. However, I am not called upon to decide this point, for this is not a case of mere acquiescence.

But if any doubt still remained in my mind, there is another point, which appears to me quite conclusive. It appears in evidence, that in the year 1798, William Allen, the father, obtained a renewal in his own name; and by a deed of the year 1795, of which the memorial only is produced, William Allen conveyed his estate, under the old and new lease, to his son, Philip, absolutely, for all the interest which he had. There was a good deal of discussion, whether I could receive this memorial as evidence of the deed, but I was of opinion, that the consent, which parties had entered into, authorized me to receive it; and I must accordingly take it, that the deed, of which it is a memorial, was a conveyance to Philip Allen absolutely of the entire interest, which William Allen had under the original settlement of 1767. Now, according to the authorities, if Philip, with the concurrence of his father, had himself obtained the renewal, there would have been no equity against him in favour of the remainderman. Can it make any difference, that it is the father who renews, and then conveys to the son? Can there be any equity for the remainderman, in \*the one case, which does not exist in the other? What does the rule require? is it not, that the entire estate should be vested in the remainderman, with the consent of the tenant for life? and is not that effected in the one case as much as in the other? That is the very case of *Blake v. Blake* (1). It is true the renewal there was taken by the *quasi* tenant in tail in possession; and, therefore, it may be said, the point did not arise; but the ground of the decision was, that the *quasi* tenant in tail had acquired the entire estate. I am, therefore, of opinion, that as a renewal by the *quasi* tenant in tail in possession would bar the remainders over; so a renewal by a tenant for life, and subsequent conveyance by him to the tenant in tail, would equally bar the *quasi* entail.

It is said, however, that there must have been other dealings between the father and son, for that, notwithstanding this conveyance of 1795, the father was still treated as tenant for life of the

(1) 3 P. Wms. 10, n.

estate; in 1802 he obtained a renewal in his own name; and certainly, whether there was a reconveyance by the son to the father, or an arrangement between them, that the father should hold for his life, the beneficial interest, at least, evidently continued in him for his life. But how would that alter the case, supposing even that there was an actual reconveyance by the son to the father? that would show that the father was tenant for life, but would it show, that the son had again become tenant in tail? There is nothing in this last objection, and, therefore, upon the effect of the deed of 1795, I should be of opinion, that this settlement of 1815 was a binding and valid settlement. There is, moreover, the renewal by William Allen, the father, \*in 1802, the interest in which vested, on the death of William Allen, in Philip, as his heir-at-law: so that the entire legal interest in the lease had become vested in the tenant in tail.

ALLEN  
v.  
ALLEN.

[ \*348 ]

It is satisfactory to me to know, that my judgment, which depends upon strict rules of law, meets the real justice of the case, and will not deprive the widow and child of the provision which was intended for them. I dismiss the bill with costs.

### BRENNAN v. BOLTON.

(2 Dr. & War. 349—356.)

Bill by a tenant in possession, under a subsisting tenancy, for the specific execution of a parol contract between him and his landlord, dismissed; the Court holding that there was no act of part performance to take the case out of the Statute of Frauds, the remaining in possession being a mere continuance of the character, which the tenant had already filled.

Any act, which may be referred to a title distinct from the parol agreement, under which the party seeking performance claims, cannot be considered as operating to take the case out of the statute.

1842.  
May 5.

SIR EDWARD  
SUGDEN,  
L.C.

[ 349 ]

THIS was a suit for specific performance. The bill stated, that James Atkinson being in possession of the lands of Balbrith, in the county of Meath, which formed a portion of the estate of the defendant, Richard Bolton, under an alleged agreement for a lease, entered into a contract with the plaintiff, William Brennan; and accordingly a memorandum was drawn up, and signed by both parties, on the 24th of March, 1830, to the effect, that James Atkinson had made over to the plaintiff the farm, which he then held in the county of Meath, at the same rent which he himself paid, 1*l.* 12*s.* 6*d.* per acre, of which there was a lease of twenty-one years, to commence from the 1st of May, 1828, to be given, which

BRENNAN  
v.  
BOLTON.  
[ \*350 ]

said James Atkinson engaged to the plaintiff, and the plaintiff bound himself to hold and keep and pay rent for same from the 1st of November then last \*past, and also agreed to take the crop of wheat then sowed, and pay a sum of 116*l.* 10*s.* for ploughing, sowing, &c., &c. ; 80*l.* of said sum to be paid on getting possession, and the remaining 36*l.* 10*s.* on the 1st of November then next.

On the 31st of March following the date of this agreement, the plaintiff paid Atkinson a sum of 40*l.*, and an indorsement was accordingly made by Atkinson on the memorandum, acknowledging the receipt of said sum in part payment of the sum therein mentioned.

The bill stated, that when this transaction between Atkinson and the plaintiff took place, the defendant was abroad, but that his agent, Mr. Justice, was acquainted with it; and that on the 3rd of June, 1830, the plaintiff paid Justice a sum of 90*l.* 16*s.* for an arrear of rent due upon the lands by Atkinson; that about a month after the plaintiff had got possession of the farm from Atkinson, the agent of the defendant took formal possession of said lands from Atkinson, and gave it to the plaintiff; and that subsequently, on the defendant's return from the Continent, plaintiff waited on him, and in the presence of his agent, Justice, and the bailiff of the estate, defendant promised to give him a lease of said farm for the lives of himself and his eldest son, or twenty-one years, whichever should last the longest, to be computed from the 1st of May, 1831, and on the same occasion gave Justice directions to have the lease prepared and executed as soon as possible.

The bill then stated that repeated applications had been made by the plaintiff for the lease; that he purchased the proper stamps for such lease, and left them with the defendant's agent, that from time to time he was put off \*with various excuses, but that at last, in the year 1840, he was refused said lease, and was served on the part of the defendant with a notice to quit, upon which an ejectment on the title had been brought for the purpose of getting possession of the farm from the plaintiff.

The bill further charged, that in the month of April, in the year 1833, the plaintiff, upon the faith of the repeated promises which had been made to him, had paid Atkinson the balance of the purchase money, agreed upon by the memorandum of the 24th of March, 1830; and further, that he had laid out large sums in permanent and lasting implements, and had acted in all respects as a solvent and industrious tenant ought; that the farm was

[ \*351 ]

BRENNAN  
v.  
BOLTON.

in fine condition, and very different from the state in which it was when it came into the plaintiff's possession.

The bill prayed, that the defendant might be decreed to grant to the plaintiff a lease of the said farm, pursuant to the aforesaid agreement for two lives, or twenty-one years, whichever should last longer, at the rent of 1*l.* 12*s.* 6*d.* per acre, with the usual covenants and clauses between landlord and tenant; or in case plaintiff should not be considered entitled to such lease, then that the defendant might be decreed to grant to the plaintiff such lease as was agreed to be granted to said James Atkinson, the plaintiff being ready and willing to execute a counterpart of such lease as should be decreed as aforesaid, and to perform all things, which according to said agreement ought on his part to be done.

The defendant by his answer admitted that Atkinson had become tenant to the lands in question, in the year \*1828, but only as tenant from year to year; that the agreement with Atkinson was but a verbal one, and defendant positively denied, that he had promised or agreed to make any lease to Atkinson, or give him any greater interest than a tenancy from year to year; the defendant by his answer also stated, that Mr. Justice, defendant's agent, never took formal or any possession of the said lands from Atkinson, or gave it to the plaintiff, or took any part whatsoever in relation to the dealings between the plaintiff and the said Atkinson, or to the delivery of possession of the said farm to the plaintiff; that on the occasion of the interview between the defendant and the plaintiff, when it was alleged that the defendant had promised to give plaintiff a lease, he, defendant had never made any such promise; that it was true, he did intend to inquire into the plaintiff's character, and if he was satisfied therewith, to grant a lease subject to certain special covenants, as to repairs and expenditure for improvements; but defendant never stated the term of lease, which the defendant would give to the plaintiff, or named the lives to be inserted therein, as in the said bill untruly stated, nor gave directions to the said Justice to have same prepared; nor did defendant intend that any lease should be either prepared or executed without further consideration as to the covenants, and the term to be introduced therein; and defendant positively stated, that he never did agree to give to the plaintiff a lease as in bill mentioned, nor was there ever any written agreement between them; and the defendant relied on the Statute of Frauds in bar of the plaintiff's relief.

[ \*352 ]

BRENNAN  
 v.  
 BOLTON.  
 [ \*353 ]

On the part of the plaintiff, the evidence of Murrin, the bailiff of the estate, and Mr. Justice, the agent, was read. \*The former stated that he was present in the year 1830, when the interview between the plaintiff and the defendant took place, and that on that occasion the defendant unequivocally promised plaintiff, that he should have a lease for twenty-one years, or two lives, and directed Justice to prepare same forthwith.

Mr. Justice in his evidence stated, that he himself had never given any promise expressed or implied, that any lease would be given to the plaintiff; that upon the occasion of the interview already referred to, no promise of any lease was made; but that the defendant in a hurried manner said, on being told that the plaintiff was an industrious man, "well Justice, if you think so, we may give him a lease;" that the plaintiff never said anything to the defendant respecting the terms of the lease, nor ever named the lives, and defendant never directly or indirectly authorized or directed witness to have any lease prepared for the plaintiff. The memorandum of the 24th of March, 1830, was also offered in evidence, but not being stamped, it was rejected by the Court. The plaintiff being unable to prove the agreement between the defendant and Atkinson, and which was denied by the answer, abandoned at the Bar the relief sought on foot thereof.

*Mr. Moore* and *Mr. Battersby* for the plaintiff relied upon the possession by the plaintiff, and the expenditure of money upon the lands, as such acts of part performance as were sufficient to take the case out of the Statute of Frauds. The agreement itself was fully established by the evidence of Murrin, the bailiff of the estate; and though no doubt there was a considerable difference between the account given by him and Mr. Justice, the landlord's agent, still the testimony \*of Murrin was perfectly clear and explicit. *Toole v. Medlicott* (1) and *Savage v. Carroll* (2) were cited.

[ \*354 ]

The *Attorney-General*, *Mr. Martley*, and *Mr. H. G. Hughes*, appeared for the defendant, but were not called on by the Court.

THE LORD CHANCELLOR:

I have no intention to go beyond the authorities, as they at present stand, with respect to the doctrine of part performance;

(1) 1 Ball & B. 393.

(2) 12 R. R. 108 (2 Ball & B. 444).

BRENNAN  
BOLTON.

the rule is perfectly clear, that if a man is in possession of land as tenant, a mere parol agreement cannot have any operation in law, for the Statute of Frauds is in the way, and there is nothing, but the subsisting tenancy, to which this Court can refer any act which may have been done, where it is consistent with his character as tenant. His remaining in possession is a mere continuance of the character which he all along filled, and any act, which may be thus referred to a title distinct from the agreement, cannot be considered as operating to take the case out of the statute. I cannot, therefore, refer any act of the tenant after his possession as tenant to a new tenancy under a parol agreement.

But here there is no evidence of any agreement. Two witnesses are examined, the bailiff of the estate, and Mr. Justice, the landlord's agent; and in reference to what was said at the Bar, in my opinion, the evidence of the latter is more safely to be relied on; now Mr. Justice completely cuts \*the ground from under the plaintiff; by his testimony the plaintiff has read himself out of Court. The case is simply this: a person of the name of Atkinson being in possession, under some written agreement (as it is alleged, for this agreement has not been proved), agreed to transfer his interest to the plaintiff; this agreement is concluded, part of the purchase money is paid, and the plaintiff actually goes into possession under this agreement. The bill prays the specific performance of a new agreement, not of the agreement with Atkinson; but of an agreement between the landlord himself and the plaintiff, and if not, then in the alternative, the specific execution of the original agreement with Atkinson; the latter relief the plaintiff has abandoned, and the question therefore now comes to this, can I specifically execute the agreement in the first part of the prayer. I have already said, that I believe that no such agreement as stated was ever concluded between the parties. There was nothing more than a hope or expectation of a lease, or something of that kind; no doubt something passed between the parties, but there is not a shadow of proof, that the term had been settled, or that the covenants to be inserted in any lease had been agreed on; but even supposing there did exist the most conclusive evidence to prove, that everything had been finally arranged, still, the Statute of Frauds would forbid my executing such a parol contract. There is no part performance to take the case out of the statute, the continuance on the part of the tenant to perform his duties as a tenant is not a ground, on which this Court could rest,

[ \*355 ]

BRENNAN as constituting an act of part performance. The improvements, which have been made on the farm, and the alleged expenditure by the tenant, are but what takes place in the ordinary course of husbandry; there is nothing in the \*case going beyond that, and it would be against all authority to say, that such acts amounted to part performance.

[ \*356 ]

I have, I repeat, no intention of going beyond the authorities. In my opinion they have gone quite far enough already: this bill, therefore, must be

*Dismissed with costs.*

1842.  
April 26

### HIGGINS v. SHAW (1).

(2 Dr. & War. 356—362; S. C. 1 Con. & L. 400.)

SIR EDWARD  
SUGDEN,  
L.C.  
[ 356 ]

After a decree, the bar to the right of reviving the suit, which arises from delay in the proceedings, depends altogether on the discretion of the Court.

Parties claiming under a marriage settlement made subsequently to a decree for an account of the real estate devised by the will of the settlor's father, which real estate was comprised in the subsequent settlement, are affected with notice, for they are purchasers *pendente lite*.

ROBERT SHAW, the testator in this cause, as principal debtor, and his brother William Shaw, as surety, executed to a person named William M'Cloughery, two joint and several bonds, each conditioned for the repayment of 200*l.* with interest, and dated respectively the 1st of March, 1807, and 2nd of April, 1809. In 1816 Robert Shaw died, having previously made his will, appointing three executors, of whom his son John alone took probate. By his said will, the testator directed his executors to pay his debts, and devised the lands mentioned in the pleadings to his sons, the said John Shaw and Godfrey Shaw in fee. At the time of his decease, the testator was possessed of very considerable personal property to the amount of about 10,000*l.* By indenture bearing date the 22nd of April, 1818, John assigned to his brother Godfrey, for a term of twenty years, all the said freehold property of the testator, upon trust, to apply the rents and profits in discharge of the testator's debts.

[ \*357 ]

In the year 1823, William M'Cloughery, the obligee of \*the said bonds, filed his bill against John and Godfrey Shaw, the heir-at-law of the testator, and other parties, praying for an account of assets, and payment upon foot of the bonds. To this bill, John Shaw filed his answer in December, 1824. He thereby admitted.

that the testator had left personal property amply sufficient for the discharge of all his debts; and he submitted to pay the amount due for principal and interest on foot of said bonds, upon condition of the plaintiff's assigning the same to a trustee for him, as the executor of Robert Shaw. In the year 1825, John Shaw married, and the property devised to him by the testator, was upon that occasion put into settlement. In 1826, a decree for an account of the real and personal estates of the testator, was pronounced against John, a decree upon sequestration having been previously obtained against Godfrey Shaw.

HIGGINS  
v.  
SHAW.

The plaintiff in the original suit died in 1827, and in the same year, a bill of revivor was filed by William Higgins, his administrator, with the will annexed, the plaintiff in the present suit. On the 2nd of June, 1828, Godfrey Shaw filed his discharge, and on the 11th of December, 1829, John Shaw likewise filed his discharge, in which he alleged, that he had disbursed sums considerably exceeding in amount the personal assets of the testator, which came to his hands. No report was ever made in this cause, nor was any further step taken until the year 1838.

John Shaw, the executor, died in 1833, having previously made his will, appointing three executors, of whom his widow Margaret Shaw, one of the defendants in the present suit, alone took probate.

In 1835 Godfrey Shaw married, and by the settlement executed upon that occasion, his share of the lands devised by Robert was vested in the trustees for the benefit of his wife and the issue of that marriage.

[ 358 ]

In 1838 the present bill of revivor and supplement was filed. It prayed that the decree of 1826 might be carried into execution. The personal representative of John Shaw, and the several persons interested under the settlements of 1825 and 1835, were made parties defendants.

The several defendants, by their answers, relied on the lapse of time since 1826: on the fact that the personal estate of the testator was abundantly sufficient for the discharge of his debts, if the plaintiffs had been vigilant: and on the settlement of 1835.

*Mr. Brooke and Mr. O'Hara, for the plaintiff:*

\* \* The settlement of 1835 was entered into *pendente lite*.

[ 359 ]

*Mr. Litton, Mr. Brewster, and Mr. W. C. Henderson, for the parties claiming under the settlement of 1835. \* \* \**



WALLACE  
r.  
WALLACE.

the deed of 1840 the son was to take an estate tail, with remainder to the father. This was not a provident arrangement, for under it the son, in case of his marriage, had not the power of making a settlement. A father should not have permitted, much less procured, such an arrangement. The father's witnesses prove that the object of this deed was to raise 1,000*l.* for the son's advancement; this is admitted in the answer; it is also admitted that the 1,000*l.* was paid to the father; he says it is in the bank, but of this there is no evidence; and I must now take it for granted, that the father has, for his own purposes, expended every farthing of this money. The father, indeed, says he inserted advertisements in the public papers, offering one thousand [pounds as] (1) thanks to any person, who would procure a suitable situation for his son; but, in point of fact, he takes his son's estate, and raises on it 1,000*l.*, and makes the son join in the collateral bond and \*warrant of attorney to confess judgment; and then he gives his son a counter security by way of indemnity. Why did not the father raise this sum upon his own property? because no one would lend him any such sum upon such security; a mere equity of redemption, mortgaged twice deep already. Is this, then, a proper arrangement to induce a young man to make, at the time he is entering into life? an arrangement, under which he might be thrown into prison, without any means of relief.

[ \*469 ]

If I look at the mortgage deeds, it is clear that the father never intended to apply the 1,000*l.* for the son's use: the recitals express the payment to the father and son, which is false, for it was paid to the father alone. This was to give a colour to the transaction, and prevent the interference of a court of equity. The mortgage to Mr. Bolton states the title correctly; the real title is there expressed, but in the mortgage to the son it is recited, that the estate was settled on the father for life, with remainder to the son absolutely. Am I not to hold the father bound by this statement? Looking at all these transactions, the pretence of the father's being protector of the settlement, the raising of the 1,000*l.* on the son's estates, and the mock indemnity on the father's property, these are clearly sufficient grounds to justify this Court, in setting aside the settlement of 1840.

As to the principles upon which this Court interposes in cases of dealings between a father and son, no doubt can be entertained.

(1) These words are omitted by an obvious error in the original report.—  
F. P.

In *Heron v. Heron* (1), Lord HARDWICKE says, “suppose the plaintiff had been entitled to a tenancy in tail of real estate, and the father, a bare tenant for life, had \*taken advantage of his son’s necessities to draw him in to join in any conveyance, which would destroy his remainder, this Court, upon very slender evidence of such a practice in the father, has relieved the son.” Lord ELDON also has laid down the rule upon the subject, in *Tweddell v. Tweddell* (2); “the Court will not view transactions between father and son in the light of reversionary bargains, but will regard them, as family arrangements, with a reasonable degree of jealousy; and will not look into all the motives and feelings, which might actuate the parties in entering into such arrangements. There may be considerations in such cases, which the Court could not possibly reach.” And again in the following page he observes, “I cannot look at this transaction upon the mere principle of bargain and sale, but I consider it as a mixed case of bargain and sale and of family arrangement.” To all this I entirely accede: but how does the matter stand here? where is the consideration? the father takes 1,000*l.* and gives the son a bad security for it; he gives up nothing to the son, he keeps his own life estate; there was no circumstance calling upon the son to give up any thing,—no younger children. It is a case of oppression.

WALLACE  
v.  
WALLACE.  
[ \*470 ]

I have gone thus fully into the circumstances of this case, lest I should appear to be opening a door to defeat family transactions. If it could have been shown, that on the whole the son understood what he was doing, and that the case was one of a family arrangement, I should have been most unwilling to look narrowly into the consideration.

I shall dismiss so much of this bill as seeks to deprive \*the father of his life estate. I shall give the son all the relief he seeks against the deed of 1840. The father must obtain a release of the son’s estate from the mortgage to Mr. Bolton, and the indemnity charge upon the father’s estate is to continue, until that release is executed.

[ \*471 ]

I am much dissatisfied with the conduct of both parties; the son has been guilty of great impropriety in the charges which he has made. I shall, therefore, not give any costs.

(1) 2 Atk. 160.

(2) 23 R. R. 168 (T. & R. 1, 14).

ALLEN  
v.  
ALLEN.

some act was done to repudiate it. It is not sufficient for those, who claim in opposition to it, to say, that no act was done to confirm it. They must go a step further, and show that an act was done to avoid it. Here no such act has been shown, but on the contrary, there has been an acquiescence by the party during his whole life. However, I am not called upon to decide this point, for this is not a case of mere acquiescence.

But if any doubt still remained in my mind, there is another point, which appears to me quite conclusive. It appears in evidence, that in the year 1798, William Allen, the father, obtained a renewal in his own name; and by a deed of the year 1795, of which the memorial only is produced, William Allen conveyed his estate, under the old and new lease, to his son, Philip, absolutely, for all the interest which he had. There was a good deal of discussion, whether I could receive this memorial as evidence of the deed, but I was of opinion, that the consent, which parties had entered into, authorized me to receive it; and I must accordingly take it, that the deed, of which it is a memorial, was a conveyance to Philip Allen absolutely of the entire interest, which William Allen had under the original settlement of 1767. Now, according to the authorities, if Philip, with the concurrence of his father, had himself obtained the renewal, there would have been no equity against him in favour of the remainderman. Can it make any difference, that it is the father who renews, and then conveys to the son? Can there be any equity for the remainderman, in \*the one case, which does not exist in the other? What does the rule require? is it not, that the entire estate should be vested in the remainderman, with the consent of the tenant for life? and is not that effected in the one case as much as in the other? That is the very case of *Blake v. Blake* (1). It is true the renewal there was taken by the *quasi* tenant in tail in possession; and, therefore, it may be said, the point did not arise; but the ground of the decision was, that the *quasi* tenant in tail had acquired the entire estate. I am, therefore, of opinion, that as a renewal by the *quasi* tenant in tail in possession would bar the remainders over; so a renewal by a tenant for life, and subsequent conveyance by him to the tenant in tail, would equally bar the *quasi* entail.

It is said, however, that there must have been other dealings between the father and son, for that, notwithstanding this conveyance of 1795, the father was still treated as tenant for life of the

[ \*347 ]

in 1802 he obtained a renewal in his own name; and, whether there was a reconveyance by the son to the father, or an arrangement between them, that the father should hold the land for his life, the beneficial interest, at least, evidently continued for his life. But how would that alter the case, supposing that there was an actual reconveyance by the son to the father, that would show that the father was tenant for life, but it would not show, that the son had again become tenant in tail? There is nothing in this last objection, and, therefore, upon the facts of the deed of 1795, I should be of opinion, that this settlement of 1815 was a binding and valid settlement. There is, however, the renewal by William Allen, the father, \*in 1802, the year in which vested, on the death of William Allen, in Philip, heir-at-law: so that the entire legal interest in the lease had vested in the tenant in tail.

ALLEN  
v.  
ALLEN.

[ \*348 ]

It is satisfactory to me to know, that my judgment, which is founded upon strict rules of law, meets the real justice of the case, and does not deprive the widow and child of the provision which was intended for them. I dismiss the bill with costs.

## BRENNAN v. BOLTON.

(2 Dr. & War. 349—356.)

Bill by a tenant in possession, under a subsisting tenancy, for the specific execution of a parol contract between him and his landlord, dismissed; the Court holding that there was no act of part performance to take the case out of the Statute of Frauds, the remaining in possession being mere continuance of the character, which the tenant had already filled. Any act, which may be referred to a title distinct from the parol agreement, under which the party seeking performance claims, cannot be considered as operating to take the case out of the statute.

1842,  
May 5.

SIR EDWARD  
SUGDEN,  
L.C.

[ 349 ]

There was a suit for specific performance. The bill stated, that Richard Atkinson being in possession of the lands of Balbrith, in the county of Meath, which formed a portion of the estate of the late Richard Bolton, under an alleged agreement for a lease, entered into a contract with the plaintiff, William Brennan; and accordingly a memorandum was drawn up, and signed by both parties, on the 24th of March, 1830, to the effect, that James Bolton had made over to the plaintiff the farm, which he then held in the county of Meath, at the same rent which he himself had been paying, viz. 12s. 6d. per acre, of which there was a lease of twenty-one years to commence from the 1st of May, 1828, to be given, which

WHITE  
C.  
SUPPLE.

The bill was filed to raised the sum of 1,000*l.*, mentioned in the covenant above stated.

[ 474 ]

The *Attorney-General*, *Mr. Brewster*, and *Mr. E. Hatchell* for the plaintiffs :

This covenant provided, that in any one of three events the 1,000*l.* should be raised ; the third of these events, viz., the birth of three daughters, has taken place. There is no authority to show that “or” can be read “and” in the construction of a covenant. The provision is most reasonable, for the power to charge given to the intended husband was restricted to 800*l.*, whether the female issue of the marriage were many or few ; an opposite intention might have been expressed without difficulty.

*Mr. Serjt. Warren*, *Mr. Brooke*, *Mr. Monahan*, and *Mr. Wall*, for the defendants, referred to *Hodgeson v. Bussey* (1), and *Wright v. Kemp* (2) :

In the latter case, in a deed of surrender of copyhold premises, “or” was held to mean “and ;” *Mr. Justice Ashmurst* says, “we must collect the attention of the parties in deeds as well as in wills ; to give effect to which the word ‘or’ may in both cases be equally construed into ‘and.’” They also contended, that supposing the second “or” was not to be read “and,” the gift never vested ; it was only to “such daughters” as had been objects of the previous power : viz., three such daughters, as should attain twenty-one years of age, or be married. Now, in point of fact, only two daughters of the marriage did attain that age or marry.

THE LORD CHANCELLOR :

[ \*475 ]

The rule of construction is quite clear, that in a deed as \*well as a will the Court may, in favour of the intention read “or” for “and,” or “and” for “or ;” and as to the argument, founded upon this being the case of a covenant, which, it is said, is incapable of alteration, I apprehend that the rule, even at law, is not so strict, but that the Court is bound to look to the intention of the parties appearing on the face of the covenant. There is an old case in *Douglas’s Reports* (3), mentioned by *Mr. Justice Buller* I think, in pronouncing judgment, where a man entered into a bond. “conditioned to be void if he did *not* pay a sum of money upon a particular day ;” a literal performance was pleaded, that the party

(1) 2 Atk. 89.

(2) 1 R. R. 748 (3 T. R. 470).

(3) Cited in *Bache v. Proctor*,  
Doug. 384.

WHITE  
f.  
SUPPLM.

did not pay. The Court held this to be a perfectly good covenant for payment of the money; that the real intention of the parties was not to be defeated, and accordingly rejected the word "not," which had thus improperly found its way into the instrument. In this case John Supple, the father, being entitled to certain real estates, on the occasion of the marriage of his eldest son, Walter William Supple, agreed to settle this property; and by a deed of settlement, most inaccurately prepared, the real estate was settled upon Walter William Supple for his life; then without limiting any term, the husband, Walter William Supple, was empowered to charge, either by deed or will, the settled estate, with a sum not exceeding 800*l.*, as a portion for one or more daughter or daughters of the marriage (not providing for an increased number of daughters, for the same sum of 800*l.* was to be raised, if there were one daughter, or twenty daughters), and to be payable in such manner and proportions, as by the said deed or will should be therein limited. A jointure of 100*l.* was then provided for the intended wife, in the event of her surviving \*her husband; no term was limited to secure this jointure, and subject to this jointure, and to the sum of 800*l.*, the estate was settled upon the issue male of the marriage, and in default of issue male, or "in case all the said issue male should die unmarried, and before their attaining respectively their age of twenty-one years, then to the use of the said John Supple, his heirs and assigns for ever, subject to the said jointure, and to the said charge of 800*l.*, for the portion of the female children of the said marriage:" so that the father knew he was to get back the estate upon failure of issue male of his son, subject to the charges I have referred to. Then, without any previous recital, follows the covenant by the father to provide additional portions for the daughters of the marriage in certain events. In consideration of the premises the father covenanted with the trustees, "that in case there shall not be any issue male of the said marriage, or that all such issue male shall happen to die under the age of twenty-one years, or that if there shall be three or more daughters of the said marriage, then and in that case the said John Supple, his executors and administrators, shall and will, out of the personal fortune, of which the said John Supple shall die possessed, pay the sum of 1,000*l.* in addition to the said sum of 800*l.* hereinbefore mentioned, to and among the said daughters, attaining their respective ages of twenty-one years or day of marriage, which shall first happen, in such shares and proportions as the said Walter

[ \*476 ]

BALFE  
v.  
LORD.

mortgage for repayment by the defendant, Lord, whenever required, distinguished this case from that of a Welsh mortgage, and that they were entitled to the ordinary decree.

*Mr. Gayer and Mr. Ferguson, for the defendants :*

The mortgage of the 18th of September, 1832, is a Welsh mortgage, in which case there can be no foreclosure, *Bonham v. Newcombe* (1), *Howel v. Price* (2). In the case of *O'Connell v. Cummins* (3), a question of this kind arose at the Rolls, upon a demurrer to a bill filed to foreclose a security such as this, and his Honour allowed the demurrer. As to the covenant on the part of the mortgagor for repayment whenever required, which is put forward by the plaintiffs as distinguishing this case from that of the common Welsh mortgage, the same circumstance was relied on in the case of *Teulon v. Curtis* (4), where a mortgagee, claiming under a precisely similar security, filed a bill for foreclosure; Lord LYNTHURST, however, held clearly, that notwithstanding the covenant for repayment, the security was in the nature of a Welsh mortgage, and dismissed the bill.

*Mr. Baker, for the defendant Wright.* \* \* \*

[ 486 ] THE LORD CHANCELLOR :

I will read over the case of *Teulon v. Curtis* before I decide the present case. In the deed of mortgage of the 18th of September, 1832, there is a covenant on the part of the mortgagor, that he will pay unto the said George Owens, his heirs, or assigns, the sum of 300*l.*, when required so to do by the said George Owens, as also the accruing interest thereon, &c. This is an absolute undertaking on the part of the mortgagor to pay, whenever he shall be required, and on such payment he will be entitled to a reconveyance of the estate. Now, this is very different from the case of a Welsh mortgage. In such a case the mortgagee is to keep possession, until by perception of the rents and profits he is fully paid; but he cannot at any moment he pleases call for payment of the principal and interest. The essence of a Welsh mortgage is, that there is no forfeiture, the principal not being payable at any given time; but here there is a covenant to pay the principal and interest, whenever the party chooses to call for it:

(1) 1 Vern. 232.

(2) 1 P. Wms. 291.

(3) 2 Ir. Eq. Rep. 251.

(4) 34 R. R. 301 (Younge, 610).

were daughters in existence to take the portions provided. Unless “or” be read “and” there would be nothing, in that particular event, for the covenant to operate upon. It must be borne in mind that, by this covenant, provision was made for several daughters only; by the former part of the settlement some portions were provided for the daughters of the marriage, and then upon the happening of the specified event, additional portions were intended to be provided, “if there should be three or more daughters.” It is clear, that the right to raise the additional portions must be taken in connexion with the subsequent qualification, viz., there being three or more daughters. That was the event intended to be provided for; but it was not intended to provide even for that, unless the previous circumstance existed, viz., a failure of issue male of the son. It is, in fact, a contingency with a qualification. In either of two events, additional portions were to be provided for the daughters, in case there should be three or more such daughters. In this way I make sense of the covenant; it then becomes an ordinary provision, and accords with the previous limitations, and I thereby give effect to the plain intention of the parties. The father is to get back his estate upon the happening of certain events, and if he does get it back, then he provides additional portions for the daughters of his son; but if the estate does not revert to him, he is not to make the additional \*provision. This is the very event which has happened. Walter William Supple had five sons, all of whom are now alive, and, consequently, John Supple, the father, never got back the estate. It appears to me to be one of the clearest cases I have ever seen: “or” must be read “and,” and on that ground alone I should decide, that in the events the additional portion of 1,000*l.* was not to be raised.

As to the other question, it admits of some difficulty. The intention of the parties was not to give the additional portions in the event of there being only two daughters; this settlement, however, makes no provision for the case of three or more daughters being reduced to the number of two by death; and that is the present case, with this circumstance, that one of the three daughters, Charlotte Supple, never attained the age of twenty-one years. Looking, however, through the whole of the clause, I do not observe that there is any gift; there is nothing more than a covenant to pay “to and amongst the said daughters, on their attaining their respective ages of twenty-one years, or day of marriage.” It cannot be said that there was any divesting of

WHITE  
v.  
SUPPLE.

[ \*479 ]



BALFE  
v.  
LORD.

As to the case of *Teulon v. Curtis*, the facts are these: Allen, who was the owner of a reversionary estate of inheritance, being indebted to the plaintiff in 1,000*l.*, demised this property to the plaintiff for a term of 500 years, with a proviso for cesser of the term on payment to the plaintiff of the principal and interest. There was in the deed a covenant on the part of Allen for payment on demand of this principal sum; and further, that until payment, the plaintiff might enter, and hold, and enjoy the premises. It was held that this mortgage, notwithstanding the covenant for payment, was in the nature of a Welsh mortgage, and that a bill of foreclosure could not be sustained. The CHIEF BARON seemed to think, that the two covenants were not inconsistent; that is, that it was not inconsistent that the one party should stipulate to hold the property, until his debt was paid, and that the debtor should covenant to pay the debt on demand. I cannot say that these covenants are altogether inconsistent. The debtor might say, "I will give a personal obligation, and I will also pledge the rents and profits of a particular estate." But there is a circumstance in that case, which altogether distinguishes it from the present, viz., a stipulation, that until payment, the party entitled to the money might enter into the receipt of the rents and profits; that gave it the character \*of a Welsh mortgage, and that is wholly wanting here. That case might have been open to another consideration; that although the party was to enter into the receipt of the rents and profits, and to continue therein until the money was paid; yet that, as the security was a reversion expectant on a life estate, the entry, which was contemplated, could not have been an immediate one, but must have been intended to take place on non-payment of the principal on demand, subsequently to the dropping of the life; there was a covenant to pay on demand, and it might have been argued, that if there was a demand, and payment was not made, the party was then to enter into the receipt of the rents and profits; it would then have been the case of a common mortgage, and in this view the covenants would be equally consistent. I should always presume that an instrument of this nature, intended as a security for money advanced, was an ordinary mortgage, accompanied with the usual remedies, unless the terms of the instrument excluded that construction.

In the present case it would be inconsistent with the covenant to say that the party is not to pay when payment is demanded. Again, the debt is secured by bond and judgment: would it not be

[ \*489 ]

a strange conclusion to come to, that the creditor might take the debtor's person, and proceed against any other property, of which he was possessed, but not against the very property which was pledged as his particular security? Why should he not have all the remedies against this property, which he might have against the other? It seems to me somewhat singular to argue, that he is not to be permitted to go against the only and very security, which was intended to be given to him. I think, upon the whole of the case, there must be a decree for the plaintiffs, and in the common form.

BALFE  
" LORD.

### FINLAY v. HOWARD.

(2 Dr. & War. 490—493.)

1842.

May 26.

Where a trust fund consisted of Government Stock, standing in the sole name of a surviving trustee, the Court, on a bill filed by the cestui que trust in remainder of the fund, appointed a second trustee in the room of the deceased trustee.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 490 ]

By deed of settlement, bearing date the 22nd of November, 1821, and executed on the marriage of Frederick Howard and Catherine, his wife, a sum of 5,000*l.*, which was the lady's fortune, was vested in Government Stock in the Bank of Ireland, in the joint names of James M'Evoy and Luke Plunket, upon trust, to pay the dividends thereof unto the said Frederick Howard and Catherine, his wife; and from and after the death of the survivor, in case there should be issue an only child, to pay and transfer said sum to such only child, or the issue of such child, at such age and time as the said Frederick Howard and Catherine, his wife, or the survivor of them, should appoint. The settlement contained a power of advancement, and also a power to appoint new trustees, in case the said James M'Evoy and Luke Plunket, or either of them, should die, or decline, or become incapable to act in the execution of the said trusts, upon the nomination of the said Frederick Howard and Catherine, his wife.

There was only one child issue of this marriage, Catherine Maria; and she, on the 22nd of July, 1839, intermarried with Sir Thomas Finlay, and upon the occasion of that marriage a sum of 1,000*l.*, part of the 5,000*l.*, was appointed by Frederick Howard and Catherine, his wife, to their daughter, Catherine Maria, and, in consideration of the marriage, and the settlement thereon executed, paid over to Sir Thomas Finlay.

The bill was filed on the 17th of June, 1841, by Sir Thomas

FINLAY  
v.  
HOWARD.  
[ \*491 ]

Finlay and Catherine Maria, his wife; it stated, \*that the plaintiffs would, on the death of Frederick Howard and Catherine, his wife, be entitled to the said sum of 4,000*l.*; that James M'Evoy had died in the year 1834, and that Luke Plunket was the only surviving trustee in the settlement of 1821, and that the plaintiffs were entitled to have a new trustee appointed in the place and stead of James M'Evoy; that they had, by notice of the 3rd of June, 1841, called on Mr. Howard to nominate a new trustee within a week. The bill accordingly prayed, that it might be referred to the Master to appoint a new trustee in the room and stead of the said James M'Evoy, and that the defendants might be directed to join in such instruments as might be necessary for assigning the said trust funds; and that such new trustee should be empowered to act with the said Luke Plunket in conformity with the trusts of the said settlement of 1821.

The defendants, Howard and wife, by their answer submitted to the Court, whether Sir Thomas Finlay was entitled to have a new trustee appointed in the place and stead of James M'Evoy. They alleged that the plaintiff's bill was filed within three weeks after the service of the notice of the 1st of June, and denied that the plaintiff, Sir Thomas Finlay, had ever previously applied to them to have a new trustee appointed; that Mr. Luke Plunket, though advanced in years, was a person of the highest integrity and character, and had always faithfully and honestly executed the trusts reposed in him.

Mr. Plunket, who was also a defendant, submitted to act as the Court should direct.

*Mr. Keatinge and Mr. Doherty* for the plaintiffs.

[ 492 ]

*Mr. Serjt. Warren, Mr. Brooke, and Mr. H. G. Hughes,* appeared for the defendants, Howard and wife.

*Mr. O'Leary* for the defendant, Plunket.

THE LORD CHANCELLOR:

This is not a very usual case; I cannot say that I remember any bill like the present, yet I do not see any objection to it upon principle; it is not exactly right that so large a fund should remain invested in the name of a single trustee, and particularly where that trustee is a gentleman so advanced in years. The plaintiff, Sir Thomas Finlay, must pay the costs of the suit; no change of

circumstances has occurred since the period of his marriage; and instead of a respectful application to the defendants, requiring them to exercise their power under the settlement, he serves a peremptory notice, intimating that proceedings will be at once resorted to, unless the demand is complied with.

FINLAY  
v.  
HOWARD.

\* \* \* \* \*

### WESTBY v. WESTBY.

(2 Dr. & War. 502—530; S. C. 1 Con. & L. 537.)

1842.  
June 1, 2, 6.

Consideration of the circumstances under which a compromise may be supported of the right to institute proceedings to set aside a transaction on the ground of illegality.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 502 ]

N. W., under the will of an ancestor, was entitled to an estate in remainder, in Blackacre, expectant upon the decease of his uncle, E. W. without male issue; and had also a remote interest in Whiteacre, expectant upon the same event. E. W. was twice married; by his first wife he had issue only two daughters; by his second, who was the sister of his first wife, he had several issue, both sons and daughters. Under these circumstances, in 1817, N. W. threatened and attempted to institute proceedings of a civil character in the Ecclesiastical Court, against E. W., and his second wife, for the purpose of annulling their marriage, and rendering their issue illegitimate. A compromise was proposed, and, after much deliberation, carried into effect by articles of agreement. By these articles E. W. agreed to secure certain provisions for the female issue of N. W., and in consideration thereof, N. W. covenanted not to impeach E. W.'s said second marriage; the articles also contained a proviso that in the event of the successful impeachment of E. W.'s marriage by any person, all the agreements of the articles should be void. In 1838, E. W. died, and his marriage was never disturbed. On a bill filed by his executor and eldest son, to set aside the deed of compromise of 1817: Held, that the arrangement was a fair family transaction, neither inconsistent with public policy, nor the principles of this Court; and the bill was dismissed with costs.

This Court will endeavour to support arrangements, by which family differences have been compromised (especially when those differences relate to questions of legitimacy) even where resting upon grounds, which might not be considered satisfactory, if the transaction had occurred between strangers.

THESE were cause and cross cause. The original bill was filed for a foreclosure and sale of property, comprised in a certain indenture of mortgage. The cross bill was filed for the purpose of setting aside the deed by which that mortgage had been assigned to the plaintiff in the original cause. By agreement between the parties, it was arranged, that \*the result of the original cause should depend upon the decision in the cross cause, and the latter alone now came on to be heard.

[ \*503 ]

Nicholas Westby, the elder, being seised in fee simple, of an

WESTBY  
 v.  
 WESTBY.

estate in the county of Clare, and also of a smaller estate in the county of Wicklow, by his will, bearing date the 3rd of October, 1798, devised the Clare estate to trustees therein named to the use (subject to certain annuities) of William Westby, the testator's brother, and heir-at-law for life; remainder to his nephew, Nicholas Westby, the eldest son of William Westby (and the plaintiff in the original cause, and principal defendant in the cross cause), for life; remainder to his first and other sons, in tail male; with remainder to the other sons of William Westby, and their issue (but who had all died without issue, previously to the execution of the deed in question in the present suit); remainder to the unborn sons of William, in tail male, remainder to the testator's brother, Edward Westby (the father and testator of the plaintiff in the cross bill), for life; remainder to his first and other sons in tail male; remainder to Edward Browne, for life; remainder to his first and other sons, in tail male; remainder to the right heirs of the testator. And the testator thereby further devised the Wicklow estate to the same trustees, to the use of the said Edward Westby for life; remainder to his first and other sons, in tail male, remainder to the said William Westby for life, remainder to Nicholas Westby for life; remainder to his first and other sons, in tail male, with remainders over; remainder to the right heirs of the testator.

[ \*504 ]

Shortly after the execution of this will the testator died; and William and Edward Westby respectively entered into \*possession of the Clare and Wicklow estates, under the devises above stated.

Edward Westby married a lady of the name of Anne Palmer, who died in the life-time of her husband, leaving issue of the marriage two daughters, but not any sons. Afterwards, some time in the year 1800, Edward Westby married Miss Phoebe Palmer, the sister of his former wife; by her he had issue, the plaintiff in the cross bill, his eldest son, and also three younger sons and three daughters.

In 1816, Nicholas Westby, who had been then a short time married, and having issue one daughter, was desirous to make a provision for her, and for any future female issue he might have. The limitations of the Clare estate, above stated, only extended to his male issue; but he saw, that if he could succeed in causing the second marriage of Edward Westby to be annulled, as being incestuous, and thereby bastardize his sons, the ultimate reversion of the estates, which would then probably devolve on him as heir-at-

law apparent of the testator, might become available for that purpose. With this view he instituted proceedings in the Ecclesiastical Court of a civil character, to annul the said marriage, and made two ineffectual attempts to serve citations on Edward Westby.

WESTBY  
v.  
WESTBY.

In the mean time Edward Westby, who, in 1814, in consequence of declining health, had resigned the office of Master in Chancery, which he had filled, left Ireland, and went to reside in France, in order to avoid the jurisdiction of the Ecclesiastical Court. However, being soon anxious, from inclination, and from the state of his health, to return to his residence in the county of Wicklow, to which it appeared \*he was much attached, and on which he had expended considerable sums in improvements, he proposed that some compromise should be effected. A correspondence of an amicable nature ensued between Edward and Nicholas Westby, in which the parties mutually addressed each other in terms of respect and affection. The result of this correspondence was, that the whole matter was referred to two friends, Mr. Fitzgerald and Mr. Greene, both members of the Bar, and connected with the parties, as arbitrators; and, after some negotiation, they made their award by way of recommendation, which was subsequently carried into effect by the instruments, which it was the object of the cross bill to set aside.

[ \*505 ]

By these articles of agreement, which bore date the 22nd of July, 1818, and were made between Edward Westby, of the first part; William Westby, Mary Westby, Louisa Westby, Wilhelmina Westby, and Nicholas Westby, of the second part; Thomas Whitney and Richard Donovan, of the third part; and Rawdon G. Greene and Joshua Nunn, of the fourth part; after reciting the will of Nicholas Westby, the elder, the marriage of Nicholas Westby the younger, and that there were female, but not any male, issue of the marriage; and also reciting the first and second marriages of Edward Westby, and the birth of female issue of the first, and of both male and female issue of the second marriage; and reciting that Nicholas Westby was entitled to a remainder in the Wicklow estate, expectant upon the deaths of William and Edward Westby, and failure of the limitation to the issue male of the latter; and further reciting that Nicholas had intended to institute, and had commenced proceedings in the Consistorial Court of Dublin against Edward Westby and Phœbe Westby, otherwise \*Palmer, his wife, for the purpose of dissolving the said marriage, and that if the sentence of the Ecclesiastical Court, necessary for that purpose, were

[ \*506 ]

WESTBY  
c.  
WESTBY.

obtained in the life-time of the said Edward and Phoebe his wife, the sons issue of said marriage would become illegitimate, and incapable of taking under the said will ; and reciting that Nicholas and Edward had agreed to compromise the said proceedings in the manner therein mentioned, viz., that Nicholas Westby should forbear from all proceedings questioning the validity of Edward's said marriage, and that in consideration of such forbearance Edward Westby had agreed to secure the sum of 6,000*l.*, to be paid on his death to the daughters of Nicholas Westby ; and further (in case Nicholas Westby should not have any issue male, and William Westby should not have any other issue male, who should in the life-time of the said Nicholas and William, or of the survivor of them, or within twenty-one years from the death of the survivor of them, bar the remainder over in the Clare estate limited to Edward and his issue male ; and if Edward Westby should not within the said time die without issue male, so that the reversion of the said Clare estate should become vested in possession in the right heirs of Nicholas Westby deceased), to an additional sum of 5,000*l.*, to be paid to each daughter, which Nicholas Westby might have, if they should not exceed four in number ; and if more than four, then the sum of 20,000*l.* to be divided amongst them : and reciting an indenture, bearing equal date with these articles, whereby Edward Westby assigned a certain mortgage for 7,000*l.* (which he had upon the estates of a person named Ulick Allen) to the said trustees, Thomas Whitney and Richard Donovan : it was by said articles declared, that the said mortgage was so assigned in pursuance of the said agreement, and upon trust that the said Thomas Whitney \*and Richard Donovan should pay the interest of said principal sum of 7,000*l.* to Edward Westby for his life ; and after his decease, in case Nicholas Westby should then be dead, not leaving any daughter then living, or who should have attained the age of twenty-one years, or been married in his life-time, then upon trust for the executors, administrators, or assigns of Edward Westby ; but if the said Nicholas Westby should be then dead, leaving any daughters or daughter living at the time of the death of Edward Westby, or if any of Nicholas' daughters should have been married, or should have attained the age of twenty-one years in the life-time of the said Nicholas Westby, or if Nicholas should be himself then living, then upon trust, as to 6,000*l.*, part of the said 7,000*l.*, for the daughters of Nicholas who should attain the age of twenty-one years or marry, in such shares as Nicholas should by deed or

[ \*507 ]

will appoint, and in default of appointment to be divided amongst such daughters, share and share alike, to become vested interests on their attaining their respective ages of twenty-one, or day of marriage; and in case there should not be any daughter of the said Nicholas, who should happen to attain the age of twenty-one, or marry, then in trust for Edward Westby, his executors, administrators, and assigns.

WESTBY  
v.  
WESTBY.

And by the said articles, after further reciting, that Edward Westby was also then seised in fee simple of certain lands, which he had himself acquired; it was witnessed, that the said Edward Westby thereby granted and demised the said lands to Thomas Whitney and Richard Donovan for the term of 999 years, to secure 5,000*l.* to each, or 20,000*l.* to all the daughters of Nicholas Westby in the course and manner above stated.

And by the said articles William Westby, Nicholas Westby, and William Westby's daughters covenanted not to adopt any measures with the view of annulling Edward Westby's marriage; and it was thereby also provided, that in case the marriage of Edward Westby and Phœbe Westby, otherwise Palmer, his wife, at any time thereafter, during the life of the said Edward and Phœbe, should be dissolved, or declared null and void by any Court of competent jurisdiction, so that the sons of the said marriage should become illegitimate, then and thereupon the agreements contained in the said articles should be at an end, and all parties restored to their original rights.

[ 508 ]

Upon this arrangement being assented to, Edward Westby immediately returned to Ireland, and no proceedings were ever taken by any person with a view to the avoidance of his marriage. In the year 1838, Edward Westby died, having previously executed his will, bearing date the 21st of December, 1833; by this will, after reciting that he was possessed of a mortgage for 7,000*l.* upon the estates of Ulick Allen, he directed his executors to call in the said 7,000*l.*, and pay his debts and legacies therewith, and bequeathed the residue of his property to his children; and the testator appointed his wife and his eldest son, William Jones Westby, the plaintiff in the cross bill, his executrix and executor: the latter alone took out probate. Shortly after the death of Edward Westby, Nicholas served a notice on the owner of the mortgaged premises, cautioning him against paying the money secured by the mortgage to any person except the trustees of the articles of 1818. In consequence of this notice, the mortgagor



WESTBY  
v.  
WESTBY.  
[ \*509 ]

declined to pay the money either to Edward Westby's executors or to the trustees; and the original bill in these causes having been filed \*to raise the amount of the mortgage money, the mortgagor paid the money into Court.

Under these circumstances (William Westby being also dead), the present cross bill was filed. The bill charged that the articles of 1818, and contemporaneous deed of assignment were fraudulent and void, as contrary to public policy, being, it alleged, the consideration for the compromise of a criminal prosecution. At the time the cross bill was filed, Nicholas Westby had one son, an infant, and four daughters, the eldest of whom had attained the age of twenty-one years.

*Mr. Serjeant Warren, Mr. Brooke, Mr. Brewster, Mr. Wall, and Mr. Maley*, for the plaintiffs in the cross cause. \* \* \*

[ 511 ]      *The Attorney-General, Mr. Moore, Mr. T. B. C. Smith, and Mr. Henry G. Hughes* for the defendants. \* \* \*

[ 513 ]      *Mr. Brewster*, in reply.

[The arguments of counsel and the cases cited by them, so far as material to the decision of the LORD CHANCELLOR, are sufficiently stated in the following judgment:]

June 3.

THE LORD CHANCELLOR:

This case has been exceedingly well argued by counsel on both sides: it is one of considerable importance, but although I do not intend finally to dispose of it, until I have had an opportunity of looking into the authorities, I am anxious, as I entertain a strong impression upon the subject, to state my present opinion.

[His Lordship then stated the facts and proceeded as follows:]

[ 515 ]      As to the question with regard to the invalidity of this marriage, there can be no controversy. The law upon the subject is perfectly settled. According to the language of a learned Judge of the Ecclesiastical Court, in the case of *Ray v. Sherwood* (1), the marriage of a man with his late wife's sister, "is a contract which is prohibited both by the laws of God and man." I need not here discuss the question whether such marriages are clearly forbidden by the laws of God—a question which has been the subject of much learned controversy—for they are unquestionably forbidden by the laws of man, and are, in a limited and restricted sense,

(1) Sir HERBERT JENNER, 1 Curt. 197.

invalid; that is to say, such marriages are voidable, though not void. A power to avoid and annul such marriages, exists during the life-time of both parties; but after the decease of either the husband or the wife, the marriage cannot be impeached, nor can the issue then be bastardized. The policy of the law, therefore (I do not now allude to the recent statute) (1), did not go so far as to declare such marriages absolutely null and void; but it left the matter open, to have them avoided or not, as persons interested thought proper to take, or to omit to take, the steps necessary for the purpose. But, on the other hand, in the event of the death of either party, before effectual proceedings were taken to avoid the marriage, no one could afterwards dispute its validity. The policy of the law, therefore, so far from declaring such contracts void, actually provided, that a period must arrive, at which such marriages, \*if not before that time disturbed, became as effectual to all purposes, as if there had not been originally any imperfection in them.

WESTBY

WESTBY.

[ \*516 ]

The practice of the Ecclesiastical Court in suits to annul marriages is equally clear. There are two modes of proceeding, by either of which a marriage may be invalidated. One is of a criminal nature (2); in that the promoter need not have any interest, for the object of the suit is the punishment of the parties for the incest of which they have been guilty; and the annulling of the marriage, or the advancement of any personal interest of the promoter, if such effect should follow the sentence of the Court to punishment, is purely incidental to that sentence. The other form of proceeding is of a strictly civil character; its object is simply to annul the marriage, without any view to the punishment of the parties: the ground of the proceeding is private, the end is the personal interest of the individual who institutes the suit; for no person can institute a suit in this form, for the purpose of invalidating a marriage, unless he has some interest in the matter. These considerations seem to open the entire nature of a case of this kind, in which the party institutes proceedings, not as a member of society to vindicate outraged law for the benefit of society at large, but simply as an individual, seeking to advance his private interest, although in advancing the latter, the former also may be incidentally promoted. This action, therefore, being one in which a question of interest was distinctly and directly involved, it would seem that there might be dealings—not corrupt dealings, for this

(1) 5 &amp; 6 Will. IV. c. 54.

(2) 1 Curt. 184; 1 Hag. 414, n.

WESTBY  
 WESTBY.  
 [ \*517 ]

Court could not tolerate such under any circumstances—but very proper \*dealings in reference to that, which constituted the sole title of the party to institute proceedings to annul the marriage, viz., the personal interest of the individual. The law did not avoid the marriage of itself, as it might have done; it merely permitted it to be avoided for the benefit of the interested person. Now, that in this instance Nicholas Westby had a sufficient interest to enable him to sustain a civil suit, it is impossible to controvert. In the case of *Lord Dursley v. Fitzharding* (1), it was held, that a vested remainder was a sufficient interest to entitle a person to file a bill to perpetuate testimony. The principle of this decision, if the point required the support of authority, would be quite sufficient to satisfy my mind, that the interest of Nicholas Westby did entitle him to institute a suit, in the civil form in the Ecclesiastical Court, for the purpose of annulling Edward's marriage; coming forward, not as a public prosecutor to punish an offence against the commonwealth, but as an individual seeking the advancement of his own private interests.

[ \*518 ]

Before I go farther, I wish to observe, that the decision of the present cause is altogether unconnected with any question, as to whether the law, as it now stands with reference to marriages between men and their deceased wives' sisters, ought, or ought not to be altered; nor is that a ground upon which I have any right to proceed; at the same time, I may be permitted to say, that if the matter depended upon me, I could never be induced to consent to the legalizing of such marriages; for independently of any question, that may exist as to the law of God, it has always appeared to me that to permit the formation of such connexions—to allow a man to look forward to any other connexion as probable between him and his wife's sister, than that of brother and sister—would be most dangerous;—that it would strike deep at the happiness of families, at the freedom of that domestic intercourse, and the security of that natural affection, which ought to exist between a man and his wife's sisters. As Hume (2) has shown, the degree of intercourse between the sexes has always been regulated by the right of the parties, in the particular country, to intermarry. Freedom of intercourse between near connexions, and a right to intermarry, have ever been deemed incompatible.

As far as regards the conduct and character of all the parties to this transaction, I do not remember to have ever met with a case,

(1) 5 R. R. 285 (6 Ves. 251).

(2) Vol. iv. 101, 8vo edit.

in which there were conflicting interests between relations, and there was more reason to be pleased with the tone and temper, and real good feeling existing amongst the parties. A conflict of interests between relations too often produces scenes of violence, acrimony, and angry feeling ; but in these transactions, whilst each party felt called upon to support the interests of his own family, the contest was carried on with mildness and mutual kindness. I must say it is quite impossible to cast the slightest blame upon any of the parties ; it is impossible to say, that there is the least foundation for any charge against Nicholas, of harshness shown by him towards Edward Westby, or of any attempt to enforce against him a claim, not fairly open to Nicholas to make.

WESTBY  
v.  
WESTBY.

Assuming, then, the law to be, that arrangements may \*be entered into, in relation to transactions of this nature ; and that if the marriage of Edward Westby was to be permitted to stand, the effect would be, that the limitation to his first and other sons would not only defeat the limitation to Nicholas immediately, but also the ultimate fee, to which Nicholas might otherwise probably become entitled through his father, William, how does the matter stand ? Edward says, “ surely you will not endeavour to dissolve a marriage so long since celebrated ; my nephew ought to be the last person to take any step for the purpose of bastardizing my children.” But Nicholas replies (for each party was naturally looking to the interests of his own family), “ you have sons, I have daughters ; it is too much to expect of any man, that merely from motives of delicacy towards a relative, he should consent to sacrifice the interests of his children. If, therefore, your marriage is not to be disturbed, and your sons are to be allowed to continue capable of inheriting these estates, you must make some provision for my daughters.” In all this I can see nothing to find fault with ; neither party attempted to make any stipulation for his personal advantage ; each party felt a natural anxiety, and was dealing with a view to the benefit of his own family. The parties were separated, and placed in opposition one to the other, by their feelings as parents. No man can be fairly called on to consent to sacrifice the interests of his children.

[ \*519 ]

Now as to the law with respect to compromises, the authorities seem to admit of a distinction. An agreement in consideration of compounding a prosecution for a felony is void ; but an agreement to make the prosecutor of a misdemeanor, of a private nature and occasioning a private injury, a reasonable satisfaction in

WESTBY  
v.  
WESTBY.  
[ \*520 ]

consideration of proceedings \*stayed, may not be illegal. It is true that in the case of *Coppock v. Bower* (1), the act which had been compromised was not a felony, but it was a misdemeanor of a public nature, bribery, an offence unlawful at common law; and the Court consequently would not allow the party to receive the reward of his corrupt and improper act. The later cases, which have been referred to, only amount to this, that every direction contained in a statute must be complied with; and if a party has been guilty of a breach of any particular statute, he cannot obtain the assistance of a court in order to recover his demand. Where a statute prohibits any thing to be done under penalties, no action grounded on the thing prohibited can be sustained by the party who has done the act. These cases, therefore, do not bear directly on the point now before the Court; but the other cases are directly applicable, for they show, that although an offence indictable as a misdemeanor may have been committed, and a prosecution may have been actually commenced, yet if the prosecutor has himself a personal interest in the matter, and it affects his property, he may consent to waive the prosecution. For instance, a man has, in some sort, a property in his own person, and if an assault and battery (which is an act of a criminal character) has been committed upon him, he may decline to institute a public prosecution, and enter into a compromise. So, if a man has a right to property, which has been invaded, and the act of invasion has amounted to a misdemeanor in the view of the law, as if an exclusive right to a fishery has been interrupted; and so in every such case in which a man has a private personal interest, he has a right, if he pleases, to forbear from a prosecution; he may \*disregard the interests of the community, and accept of compensation for the injury inflicted on himself. This class of cases, therefore, as far as it goes, is in favour of the view, which I am at present disposed to take of this question; for is not this a case in which the personal interests of the party were deeply involved, and in which, consequently, he had a right to waive a consideration of the public wrong, and enter into a fair *bonâ fide* arrangement for the advancement of those personal interests?

[ \*521 ]

There never was an arrangement entered into with more deliberation than the present; it was formed after a protracted treaty and long correspondence between the parties; it was the contract of a man of the most business-like habits, made under the advice of

counsel, and with the assistance of friends. The matter had been referred to arbitrators, who acted as the mutual friends of both parties, and having fully investigated and discussed the subject, made their award by way of recommendation. The motives, by which the parties were actuated, were the interests of their respective families, and the arrangement which resulted was solemnly carried into execution. This arrangement was simple in its nature and reasonable in its stipulations; it amounted to this: Edward Westby said, "If my sons, whose rights to this property may be disturbed, and whose interests are liable to be defeated, are permitted to enjoy it without molestation, depriving you and your daughters of it, I will, out of my own property, provide for your daughters." How can it be said that in this there was anything unreasonable? It appears to me that in the way of compensation, nothing could be more fair than the arrangement.

WESTBY  
v.  
WESTBY.

*Mr. Moore* has directed my attention to the circumstance, which had not escaped me, that the deed contains a special provision, that in the event of any party taking effectual steps to annul the marriage, there should be an end to the whole arrangement. The property, therefore, of Edward Westby was not to be affected by any lien or incumbrance, unless his sons obtained the actual enjoyment of the estate, and took the benefit of this arrangement at the expense of the daughters of Nicholas Westby, who but for the arrangement would have become entitled.

[ 522 ]

The state of the statute law, in my opinion, is calculated to throw considerable light upon this subject. Looking at the recent Act of Parliament, that Act was introduced for the purpose of rendering valid all such marriages, as had been actually solemnized before a particular day mentioned in the Act. The Legislature thereby made all previous marriages had up to that date valid, so that they were no longer liable to be impeached; and this enactment was perfectly consistent with sound morality, inasmuch as all marriages solemnized before the passing of this Act, would, independently of the statute, have become valid in process of time, unless, during the life-time of both parties, due steps were taken to set the marriage aside. However, the Legislature did not mean to give any validity to future marriages of this nature; and, accordingly, whilst the statute rendered previous marriages altogether unimpeachable, it enacted, that such marriages contracted after the particular day mentioned, should be, not merely voidable as before, but absolutely void. Independently, therefore, of the effect of the

WESTBY  
 v.  
 WESTBY.  
 [ \*523 ]

deaths of the parties, Edward Westby's marriage is now quite unimpeachable. But how would the case stand, if the marriage had been contracted since the day \*fixed? it would be utterly null and void. Nicholas would be tenant for life of the estate, with remainder to his sons successively in tail male, with the reversion in fee vested in himself, and the issue of Edward never could have taken at all.

It is said that the arrangement made in this case ought to be set aside, as being contrary to public policy; but I must confess, it would appear to me to be very difficult for this Court to treat the arrangement as opposed to public policy, when the Legislature has thought fit to treat the subject in the manner it has, this Act of Parliament actually giving perfect validity to all former marriages. The transaction may or may not be considered, as in a certain limited sense, contrary to public policy; but it is not one of those great points contrary to public policy, which can never, under any circumstances, be countenanced. The tendency of the common law was the other way; for when, by the law of the Ecclesiastical Courts, such marriages were liable to be impeached at any time, the common law interposed in their favour, and declared, that after the death of either party the marriage should be unimpeachable. Then if the statute law is relied on, the position is untenable, for the balanced enactments of the recent statute conclusively prove, than in the opinion of the Legislature at least, the bearing of public policy upon the subject was not so very strong. If the general impropriety of the compromise is insisted upon, I must look at all the circumstances of the case as they come before me. Now, the circumstances are these: this bill is filed after the end of Edward Westby's life; he had lived for many years after the arrangement; it had been acted on during his life; he had never questioned it.

[ \*524 ] It is not until twenty-two years have elapsed, \*since the transaction took place, that now, he being dead, his executor, who also happens to be his eldest son, comes forward to impeach it. A transaction may be so inconsistent with public policy, that no time can give any validity to it; but I certainly did not understand that it was even attempted to be argued that this case was of that nature. Counsel did not venture to assert that this contract was a *malum prohibitum* of so bad a character, that the transaction never could obtain validity by any confirmation. How, then, does the question stand? The party who has the immediate right to impeach the transaction, lies by for twenty years without attempting to impeach

it ; he does not repudiate the benefit, and he clearly died in the full persuasion that the contract was binding upon him. How can this Court, after the lapse of twenty-three years, disturb this arrangement, when it would be impossible to replace the parties in their original position, or restore to them their former rights? Now, when they desire to impeach this agreement, Edward Westby is dead ; and, therefore (independently of the statute), all objection to the validity of his marriage is gone ; it must be looked upon as a perfectly valid marriage, and the children, the issue of it, are legitimate. The law not only did not itself impeach the marriage, but provided that now nobody could impeach or affect its validity ; and yet this Court is asked to set aside this contract as against public policy. But public policy operated in two ways, it was part of the public policy to prevent the avoidance or annulling of such marriages, after a certain period ; that period has now elapsed, and these parties ought to have come sooner. Public policy thought fit to leave it to chance, whether such a marriage should or should not be avoided in the life-time of both parties, but public policy also provided that unless the avoidance was \*effected during the life-time of both parties, the marriage should be absolutely unimpeachable. It was public policy to discountenance and check the celebration of such marriages ; it was public policy to permit such marriages to be annulled and avoided, if the proper steps for that purpose were taken within a reasonable time ; but it was also public policy, that after the lapse of a particular time, such marriages should be to all purposes valid. Edward Westby is dead, consequently there is not now any principle of public policy, upon which the plaintiff can rest his case. Parties have thought proper to wait until the tendency of public policy is no longer to avoid, but to support, this marriage, and that, in all its relations and consequences.

WESTBY  
v.  
WESTBY.

[ \*525 ]

There is another point of view in which this case must be considered (a view which strongly inclines me to support this arrangement, if I can possibly do so consistently with the rules of this Court), that is to say, that this was a family arrangement. Now, from the case of *Stapilton v. Stapilton* (1), down to the present day, the current of the authorities has been uniform, and wherever doubts and disputes have arisen with regard to the rights of different members of the same family (and especially, I may observe, where those doubts have related to a question of legitimacy), and fair compromises have been entered into, to preserve

(1) 1 Atk. 2.



WESTBY  
C.  
WESTBY.

[ \*526 ]

the harmony and affection, or to save the honour of the family, those arrangements have been sustained by this Court, albeit perhaps resting upon grounds, which would not have been considered satisfactory, if the transaction had occurred between mere strangers. Now, in this point of view, whether the legitimacy of Edward Westby's sons \*was struck at by the common or the statute law, is perfectly immaterial; for generally, if there be a legitimate son and an illegitimate son, it cannot admit of any doubt, that under the state of circumstances, involving the honour and credit of a family, there may be a compromise binding upon the legitimate son, by which he agrees to give up a particular part of the property to his illegitimate brother; and that not of course upon any title in the illegitimate son, but simply upon the ground that such an arrangement was for the honour of the family, and the settlement of family differences, and to avoid any question of legitimacy. I have a strong impression upon my mind that the authorities do not establish the propositions, for which the plaintiff's counsel have contended, and certainly I am not prepared to say, that I think those authorities ought to be extended. Can it be my duty to say, that it is the policy of the law to embitter the feelings of families to that extent, which would be the necessary consequence of compelling a nephew to impeach the marriage of his uncle? On the contrary, I do think it is the policy of the law to support and uphold such an arrangement as the present, entered into between the several members of this family, by which Nicholas consented to forego all proceedings with a view to invalidate the marriage of his uncle, after the birth of several children, the issue of the marriage, and consented, not for the sake of any individual (I mean any strictly personal) benefit, but in order to promote the interests of his children. At present, then, this does appear to me to be an arrangement, which may be sustained without violating or transgressing any rule of law, always bearing in mind the principle, which conferred on a person having an interest in a marriage, a right for the sake of that interest to impeach the marriage. The law required that he should have an \*interest in the question, and as a consequence of that interest, gave him a permissive right to impugn the validity of the marriage; but no law required, no law imposed it upon him as a duty, that he should come forward as a public prosecutor to annul and punish the forbidden marriage of his relative.

[ \*527 ]

I do not now finally decide this case; I shall look into the

authorities to which I have been referred; but unless I am compelled by them to decide the case differently, I shall certainly dismiss this cross bill with costs.

WESTBY  
 T.  
 WESTBY.

THE LORD CHANCELLOR:

June 6. .

I have considered the cases referred to, and as far as they go, I think they are authorities for the view which I took at the hearing. There is one case not referred to at the Bar, in which a question very similar to the present was much discussed, I allude to *Fauntleroy's* case; there Mr. Fauntleroy had committed a felony by forging a power of attorney, and under this power of attorney Government Stock was sold out, and the produce applied to the benefit of the banking firm, of which he was a partner. The owners of the stock attempted to prove for the value of it against the joint estate of the firm. It was insisted that no man could recover under such circumstances where a felony had been committed, until the conviction of the felon, and that at all events, the owners could not prove against the estate of the felon, for that to do so would be an adoption of the felony. That case was argued more severely than any I can remember: I argued it myself several times, and on each occasion it was insisted that the party could not \*proceed against the estate of the felon. The case first came on at law under the name of *Stone v. Marsh* (1), and there the Court of Queen's Bench were of opinion that the owners might prove against the estate, and it was not denied that after conviction an action might be maintained. Lord TENTERDEN says (2), "it was contended that the maxim of ratifying a precedent unauthorized act, and taking the benefit of it, cannot apply to a void or felonious act; and that here the plaintiffs were seeking to ratify the felonious act of H. F., and were making that act the ground of their demand. In this latter assertion lies the fallacy of the defendant's argument. The assertion is incorrect in fact; the plaintiffs do not seek to ratify the felonious act; they do not make that act the ground of their demand." And in the preceding page (3) he observes, "the rule is founded on a principle of public policy, and where the public policy ceases to operate, the rule shall cease also." The case then came before the Bankrupt Court in *Ex parte Bolland* (4), and Lord LYNDBURST says, "I agree with the court of law in

[ \*528 ]

(1) 30 R. R. 420 (6 B. & C. 551).

(3) 30 R. R. 430 (6 B. & C. 564).

(2) 30 R. R. 431 (5 B. & C. 565).

(4) 1 Mont. & M'Ar. 315, 395.

WESTBY  
 t.  
 WESTBY.

[ \*529 ]

considering it a mere fallacy to say, that by adopting these acts the parties are, in effect, ratifying a felonious act." The case afterwards was brought under the consideration of the House of Lords, and is reported under the name of *Marsh v. Keating* (1), and there the same point was decided. These decisions only bear upon the present case by way of analogy. They show that a principle of public policy will not always be carried through to every possible consequence, and illustrating the doctrine, that a general principle of public policy varies under circumstances, corroborate my former view of the present question. This was an offence not punishable at common law. In this case \*the commission of it interfered with the rights of property. A particular remedy, a civil one, was provided by the law for the party having an interest, and no other person could institute a proceeding, having for its immediate object the avoidance of the marriage. No one was bound by law to take steps to set aside the marriage, and and if no one did set it aside whilst both parties were living, the law rendered the marriage unassailable. The law, therefore, was one with a double aspect. The marriage having been solemnized and issue born, I cannot say that it was against the policy of the law to let the Act of the Legislature work its own purpose. A contract by a man, not having an interest, to abstain from proceedings to punish the incest, would stand upon grounds wholly different; the Court would without difficulty have set aside such a contract. Here there was no contrivance to prevent any other person from enforcing the law. The act was a reasonable one to save the honour of the family, and it was strictly a family transaction, and not a mere bargain between two individuals. Each parent was protecting the interest of his children and not bargaining for his own. The fluctuations in the law indicate how little it could be deemed a settled maxim of public policy, that such a marriage should be impeached; the Legislature would, itself, at a later period, have rendered this very marriage valid, which the other members of the family had simply engaged not to disturb. I think, therefore, that my original impression was the correct one; I think also, that the long acquiescence in the arrangement by Edward precludes his personal representative from seeking to impeach it, now that Edward and his family have had all the advantages which could be derived from it. I am bound to believe, that Edward

himself would never have sought to impeach the transaction; and after an acquiescence in it by \*Edward during his life, a period of twenty years, I think it was too late for his personal representative to file this bill; therefore it must be

WESTBY  
v.  
WESTBY.  
[ \*530 ]

*Dismissed with costs.*

# IN RE HENNESSY, A BANKRUPT.

(2 Dr. & War. 555—566; 1 Con. & L. 559.)

1842.  
*June 11.*

H. being a trader, and the local agent of an Insurance Company, whose head office was in Dublin, effected two policies of insurance with the Company upon his own life, and subsequently assigned these policies over to a banking firm, to which he was largely indebted. At the time of the assignments respectively, a formal notice of the fact was given to him as agent of the Company. H. subsequently became bankrupt, and afterwards died. On a contest between the assignee of the policies, and the general body of creditors: Held, that the notice was insufficient, the transaction being a Dublin one, there being nothing on the face of the policies to show that they were effected in the place for which H. was agent.

SIR EDWARD  
SUGDEN,  
L.C.  
[ 555 ]

*Semble*, when the agent and assignor are the same person, notice to the agent is not sufficient.

THIS case came before the Court, upon a petition of appeal from the decision of Mr. Commissioner MACAN.

It appeared that the bankrupt, David Hennessy, in the year 1839, was a trader resident in the city of Cork, and held the office of local agent to the Caledonian Insurance \*Company; that some time previous to that year, having become indebted to the branch of the National Bank at Cork, in the sum of 4,600*l.*, in order to secure the payment of the same, amongst other securities, he proposed to assign to the directors, four policies of insurance, one of which, amounting to the sum of 500*l.*, had been effected with the Caledonian Insurance Company upon the life of the said Hennessy; and that accordingly, by indenture bearing date the 11th of April, 1839, he assigned unto James Roche and John Reynolds, as trustees of the said Bank, the said several policies of insurance, and also handed over the policies themselves to the said trustees. At the same time, and immediately after the execution of the said deed, Reynolds, who was the principal agent and inspector of the Bank, addressed Hennessy thus: "As you are agent to the Caledonian Insurance Company, take notice, that the Bank is now the assignee and holder of these policies;" to which Hennessy replied, that he would do so, and that a written notice was not necessary.

[ \*556 ]

Hennessy being still largely indebted to the Bank, effected

In re  
HENNESSY.

another policy upon his life with the same Insurance Company, for 1,200*l.*; and by deed of the 10th of December, 1839, he assigned this last-mentioned policy to Mr. Thomas Rowan, the then manager of the National Bank at Cork; and this deed and the policy were delivered over to Roche, one of the directors of said Bank; and on the latter occasion, the solicitor for the Bank desired Hennessy to take notice, that the policy had been assigned, remarking, that the Insurance Company had notice of the assignment through him.

[ \*557 ] On the 14th of December, 1840, a commission of bankruptcy \*issued against Hennessy, and shortly afterwards Hennessy died; and upon his death, his assignee claimed the two policies of insurance, upon the ground that no sufficient notice of the assignments or either of them had been given by the Bank to the Insurance Company.

The case was argued before Mr. Commissioner MACAN, and on the 6th of June, 1842, he decided against the Bank, and in favour of the general creditors, upon the insufficiency of the notice. From that order the present appeal was brought.

[ \*558 ] The deposition of Mr. Christopher Eiffe, which is referred to in the judgment of the LORD CHANCELLOR, was in substance as follows: He stated that he was the manager for Ireland, of the Caledonian Insurance Company, which was a Scotch Insurance Company, having their principal place of business in Edinburgh; that all the sub-agents for the said Company were appointed by him, and gave security to him for the performance of their duties, and that he was responsible for their acts to the Company; that these sub-agents were bound to communicate with him, on matters of business connected with the Company, and were in the habit of communicating with him, and not with the Company; that he had appointed Hennessy as his sub-agent; that upon all matters of business, Hennessy had always communicated with him, and never, to his knowledge or belief, with the Company; that he had no notice whatsoever of the assignments until the month of April, 1841, when the two deeds were brought to his office by Mr. Hartnet, on the part of the Bank, up to which time, neither he nor the said Company, according to his belief, had any notice or intimation whatsoever of the said assignments, or \*either of them; “and that from the 1st of February, 1839, no notice of any assignments was transmitted to deponent's office by said Hennessy, in consequence of the directions, which deponent had given on said day.”

*Mr. Moore, and Mr. Monahan, for the National Bank.* \* \* \*

In re  
HENNESSY.

*Mr. Pigot, and Mr. John D. Fitzgerald, in support of the order.* \* \* \*

[ 559 ]

[The arguments of counsel, and the cases cited by them, so far as material to the following judgment, are sufficiently stated therein.]

THE LORD CHANCELLOR:

[ 561 ]

A similar case to the present is not likely again to occur. The rule is perfectly settled, although I do not quite understand all the principles, upon which the cases have proceeded. Notice is necessary (to whom may be a question), to take choses in action and property of this description, out of the order and disposition of the trader (1). The cases do not go very far. In the case before Lord Lyndhurst (2), notice had been given to only one of the trustees of the property, which had been pledged by the trader, the cestui que \*trust, to the creditor, and that only casually; it was perhaps not intended to be a notice, yet as the trustee was made acquainted with the fact, it was held indifferent whether it was given formally or not. In *Gardner v. Lachlan* (3), notice to the party, by whom the immediate payment was to be made, was considered to be sufficient. The broker was the only person with whom the contract was made by the Navy Commissioners; the money was to be paid to him, and, therefore, notice to him was quite right. There is more difficulty about the case of *Ex parte Waithman* (4); there the bankrupt being indebted to his bankers, Messrs. Williams, Deacon & Co., deposited with them a policy of insurance of the Guardian Assurance Company. The bankrupt being one of the directors of the Company, and Williams, one of the bankers, being one of the auditors, it was considered unnecessary to give to the Company a formal notice of the claim of the bankers to the policy: and ERSKINE, Ch. J., says, "I am of opinion that there is sufficient evidence of the fact of the office having had notice of the claim of Messrs. Williams, Deacon & Co., to the policy in question. It was superfluous to give a specific and formal notice, where one of the directors and the auditors of the Company were

[ \*562 ]

(1) The order and disposition clause in bankruptcy no longer applies to policies of insurance, and it is not clear how, under the old law of bankruptcy, a policy could be said to be in the order and disposition of an owner

after he had parted with the possession of the policy.—O. A. S.

(2) *Smith v. Smith*, 39 R. R. 762 (2 Cr. & M. 231).

(3) 42 R. R. 124 (4 My. & Cr. 129).

(4) 4 Deac. & C. 412.

In re  
HENNESSY.

[ \*563 ]

both cognizant of the fact." That certainly bears more closely upon the present case, than any other that has been cited; but there is considerable difficulty in this way of viewing the question; because, if the object is to give notice to the person, who has to pay the money, so as to strip the trader of all appearance of ownership, that is not the best way of effecting the object. The circumstance, that it was one of the directors, who was pledging his own policy, made it \*not likely that he would communicate the fact of the deposit to the general body; and I apprehend that it is not necessary to ask each director of the Company if notice has been received; for if that were the rule, a creditor might be obliged to go half round the kingdom, to discover whether notice had been given or not. Therefore, the rule was established, that notice may be given to an officer, who represents the Company, and the effect of the notice thus received by that officer, is sufficient to bind the Company, even though not communicated to them. The circumstance, that one of the depositories of the notice in *Ex parte Waithman*, was an auditor of the Company, can scarcely be considered of importance. An auditor is not an officer to represent the Company in respect of their dealings. Could his act bind them? Would he have been the proper person, to whom notice of a deposit like this should be given? I apprehend not.

[ \*564 ]

In this case Hennessy was the local agent of the Caledonian Insurance Company in Cork. There was a head office of the Company in Dublin, under the management of Mr. Eiffe. This gentleman states in his deposition, that the local agents were in point of fact his agents; and were bound to transmit all information on matters of business connected with the Company to his office; that they did not communicate with the said Company; and that he had only known one or two instances where any of these agents did so; that he was responsible for all the arrangements made by them. Eiffe, as I understand the case, was the general agent for all Ireland; he appointed whom he thought fit for the different places; they were answerable to him; he represented the Company in this country, and was alone \*responsible to the Company in Scotland for the acts of the sub-agents here. Hennessy had effected two policies on his own life. There is nothing whatever on the face of these policies, to show that they were effected in Cork. I must draw reasonable inferences, and I therefore infer, that the transaction was of \_\_\_\_\_ at, which has been stated; that it w \_\_\_\_\_ o in Cork, but in

Dublin, between the principal agent there, and Hennessy, as a private individual in Cork. I must presume, that the transaction was regularly completed, and that Hennessy was not allowed by the principal agent of the Company to insure his own life at Cork, without communicating with the head office in Dublin. It would have been a mere farce for Hennessy to have entered into an inquiry with himself, as agent for the Company, and as such agent to have satisfied himself as to the goodness of his own life. I consider this, therefore, to be a Dublin transaction, at the principal office. Now that being the case, what is there to authorize a notice at Cork. I could not hold, independently of the peculiar character which the bankrupt filled, that a notice served in Cork would have been sufficient; such a notice could only avail in the case of a Cork transaction. That, therefore, disposes of the case altogether: and here I may observe, that if the Company, in order to avoid being embarrassed by notices, give directions, that notices served on their agents should not be forwarded to them, they will in the end find that they are embarrassing themselves, for any notice properly served on any of their agents will bind them; and if, under such circumstances, they pay the amount of the insurance, without regard to the transfer, they will be compelled by law to pay it over again.

In re  
HENNESSY.

I think it unnecessary to decide the principal question raised here; but I must say, I think there is great weight in the opinion of the Bankrupt Court: for if the principle of law is, that by notice to the party, who is to pay the money, you are to strip the trader of all appearance of ownership, so that all the world may know how he stands as to that security, then the service of a notice upon Hennessy, as the agent of the Company, would not answer that purpose; and in fact, the argument must go to this extent, that Hennessy, being both agent and assignor at the same time, it was not necessary to give any notice. If the object be to deprive the party of all power of dealing with the property, so that it may be put out of his order and disposition, is that likely to be effectuated in this way? Is Hennessy, after he has insured his own life, to be permitted, without any notice to assign the policies, because he is local agent? Is it reasonable to suppose, that any notice would ever have been given by him to the head office? The moment he gave such notice, the manager or directors might say, we think you an embarrassed man, and we shall therefore remove you from the agency.

[ 565 ]

The case of notice to an agent to bind the principal is entirely different from the question which is raised here. In such a case,



In re  
HENNESSY.

notice, when in the same transaction, will bind the principal, who is the purchaser; but here, on the contrary, the notice comes from the purchaser, and to the party, who has made the assignment, upon the ground that he is agent for those, who are liable to make the payment. The distinction between the cases is plain. The notice here, of course, never reached the Company. I should, I think, have come to the same conclusion, upon this second ground, \*as the Court below did; but I am not called upon to decide that question. On the first ground, therefore, I affirm the order.

[ \*566 ]

## IN THE QUEEN'S BENCH.

### FIGG v. WEDDERBURNE (1).

(11 L. J. Q. B. 45—47; S. C. 6 Jur. 218.)

1841.  
Nov. 24.  
Bail Court.  
[ 45 ]

Infancy—Evidence, Hearsay.

*Quere*—Whether to support a plea of infancy, declarations by the defendant's father, (since deceased,) as to his son's age, are admissible in evidence.

*Semle*—Per PATTERSON, J.: They are not.

ASSUMPSIT for the hire of a horse and gig.

Pleas: First, *non assumpsit*; secondly, infancy at the time of the promise. Issue thereon.

At the trial, before the under-sheriff of Oxfordshire, July 10, 1841, in support of the plea of infancy, two letters were tendered in evidence, written in 1835, by the father of the defendant, (since deceased,) to a gentleman whom he wished to engage as tutor for the defendant, which letters stated the exact age of the defendant, and showed him to have been a minor at the time of the contract, upon which the action was brought. The plaintiff's counsel objected, that these letters were inadmissible, as hearsay only. The objection was overruled by the under-sheriff, and the letters were read. No evidence was offered on the part of the plaintiff to contradict them, but the jury notwithstanding found their verdict for the plaintiff, damages 5*l.* 18*s.*

*V. Lee*, in this Term, obtained a rule *nisi* for a new trial, on the grounds of surprise, \* \* and also that the verdict was perverse, and contrary to evidence.

*Pigott* showed cause:

The letters in question were improperly received in evidence, and

(1) *Huines v. Guthrie* (1884) 13 Q. B. Div. 818, 823, 830.

therefore the verdict, though found contrary to such evidence, will not be set aside on that account. The better opinion seems to be, that such evidence would not be admissible, even in the strictest question of pedigree. Upon this point he cited *Herbert v. Tuckal* (1), *Roe d. Brune v. Rawlings* (2), *Higham v. Ridgway* (3), *Doe d. Johnson v. Lord Pembroke* (4), *Rex v. Eriswell* (5), *Monkton v. The Attorney-General* (6), and *Kidney v. Cockburn* (7). This, however, was not a question of pedigree, and there can be no necessity for extending the rule against the admissibility of hearsay evidence, to a case where the fact to be proved was of such recent occurrence, and admitted of the ordinary and more satisfactory proof. The letters in question were not entries, or declarations made against the interest of the party, for the defendant's father might have suppressed his son's age to induce the person to whom he was writing to take him as a pupil on lower terms. They do not, therefore, come within the rule in *Higham v. Ridgway*, and *Whitelocke v. Baker* (8).

FIGG  
v.  
WEDDER-  
BURN.

*V. Lee*, in support of the rule, contended, that in most of the cases cited, similar evidence had been received, but relied principally on the defendant's having had no notice of trial, as hereafter stated.

*Cur. adv. vult.*

PATTERSON, J., on a subsequent day, (November 24th,) [after dealing with the question of want of notice of trial, said:]

Upon the trial, he [the defendant's attorney] gave in evidence two written declarations, made by the defendant's father, as to the infancy of his son. Now, this evidence was clear and decisive, and upon it I think the jury ought to have found their verdict for the defendant. I cannot think that any jury are justified in finding a verdict directly contrary to uncontradicted evidence, upon the truth of which no suspicion has been thrown. The declaration of the defendant's father was a very natural one, not made for the purposes of the cause; indeed, made long before any such action could have been thought of, in letters to a friend upon other subjects. This, however, was an action brought by a tradesman for goods supplied to an infant, and the jury thought proper, in the teeth of this evidence, to find their verdict for the plaintiff. I should say, therefore, this verdict ought to be set aside, as perversely contrary to

[ 46 ]

(1) Sir T. Ray. 84.

(2) 8 R. R. 632 (7 East, 290).

(3) 10 R. R. 235 (10 East, 109).

(4) 11 R. R. 260 (11 East, 504).

(5) 3 T. R. 707.

(6) 34 R. R. 38 (2 Russ. & My. 147).

(7) 34 R. R. 47 (2 Russ. & My. 167).

(8) 9 R. R. 216 (13 Ves. 514).

FIGG  
v.  
WEDDER-  
BURNE.

the evidence. But the answer of the plaintiff to this is, that he objected at the trial to the reception of this evidence as hearsay only, and therefore inadmissible. The question then arises, is this evidence of the infancy of the defendant or not? I confess I have a strong opinion that it was not receivable. But the cases upon this subject are conflicting. In *Kidney v. Cockburn*, which was an issue from the Court of Chancery, TINDAL, Ch. J., rejected the declarations of deceased persons, tendered as evidence to prove the ages of the persons to whom they referred, but when this case came before the Lord Chancellor (BROUGHAM), he differed in opinion from the LORD CHIEF JUSTICE. He thought such declarations admissible, and stated, that in that opinion PARK, J. and LITTLEDALE, J. concurred: and he directed another issue to be tried, in which the question would have again arisen. The parties to that suit, however, compromised the matter, so that that case cannot be considered an authority on either side. But there are cases in which such declarations have been received as evidence. It seems to have been admitted by all the Judges, in *Rex v. Eriswell*, that they would be receivable in a case of pedigree, though they differed in their judgment in that case upon other grounds. This matter is, therefore, so undecided, that if the question in the present case turned wholly upon this point, I should wish the case to be argued before the full Court, in order that it might receive a formal decision. \* \* \*

*Rule absolute, upon payment of costs.*

## IN THE COURT OF COMMON PLEAS.

### URSULE LE NORMAND *v.* THE PRINCE OF CAPUA (1).

(11 L. J. C. P. 58; S. C. 6 Jur. 64.)

Costs, security for—Foreigner.

A foreigner, whose ordinary domicile was in France, but who had an establishment in London, which she occasionally visited, brought an action for goods sold, amounting to 967*l.*, 560*l.* of which the defendant admitted to be due; the Court directed, that upon payment of that sum into Court, a portion of it should be retained as security for the costs of the action.

*WILDE*, Serjt. obtained a rule, calling upon the plaintiff to show cause why all proceedings in the action should not be stayed, until

(1) B. S. C. Ord. LXV. rr. 6, 6 a. Practice, but appears to be almost the  
[This case is not cited in the Annual only authority on the point.—F. P.]

1841.  
Nov. 22.

[ 58 ]

the plaintiff gave security for costs. From the affidavit of the defendant's attorney, it appeared, that the action was brought to recover 967*l.* for goods sold and delivered, of which sum the defendant admitted that 560*l.*, and no more, was due. The plaintiff, who is a foreigner, resided almost wholly in France, but had an establishment in George Street, Hanover Square. Upon inquiry at that place, the defendant's attorney was informed that the plaintiff was in Paris, and was not expected in England for a month. It was also shown, that on the 8th of July, the plaintiff, then in England, had written a letter, stating that she had been obliged to give up her books to her creditors, and that she was on the brink of ruin.

LE NORMAND

THE  
PRINCE OF  
CAPUA.

*Channell*, Serjt. showed cause against the rule, and produced affidavits, from which it appeared, that though the plaintiff's ordinary domicile was in Paris, yet in the months of May, July, and September last, she was in England, residing in George Street, Hanover Square, and conducting her business there; that she had paid 600*l.* for the assignment of the lease of the house, and a rent of 240*l.* per annum for it, and that it was insured for 2,400*l.* Under these circumstances, there could be no intention on her part to abscond, and no necessity therefore for this application.

*Wilde*, Serjt., in support of the rule, urged, that a foreigner not actually domiciled in this country, was bound to give security for costs: *Naylor v. Joseph* (1), *Oliva v. Johnson* (2).

PER CURIAM :

The defendant admits 560*l.* to be due from him to the plaintiff. Upon his paying that sum into Court, let such portion of it as the Master shall think fit, be retained as security for the defendant's costs, if he succeed in the action as to the remainder of the sum claimed.

*Rule accordingly.*

(1) 10 Moore, 522; S. C. 3 L. J. C. P. 207.

(2) 5 B. & Ald. 908.

1842.  
Jan. 14.

[ 123 ]

# AVELETT v. GODDARD.

(11 L. J. C. P. 123.)

Arbitration—Award, where final.

A finding by an arbitrator, leading by necessary inference to the decision of the issues in the cause, is sufficient, though there be no express direction for which party one of the issues shall be entered.

DEBT for 300*l*.

Pleas: first, never indebted; second, payment; third, set-off.

The action was referred to an arbitrator, who, in November 1841, made his award as follows: "As to the first issue, I find that the defendant was indebted to the plaintiff in 108*l*. 7*s*. in manner and form, &c.; as to the second issue, that the defendant did not pay to the plaintiff the said money in the second plea mentioned, &c.; as to the third issue, I find that the plaintiff was indebted to the defendant in the sum of 105*l*. 6*s*. 11*d*.; and I do order and award, that the debt due from the defendant to the plaintiff, as found by my verdict, upon the first issue, be reduced to the sum of 3*l*. 0*s*. 1*d*., and the damages to 1*s*."

*Shee*, Serjt. moved for a rule, calling upon the defendant to show cause why the verdict found by the arbitrator should not stand, and all the issues be entered for the plaintiff. It appeared, that the Master had upon taxation declined to tax the costs upon the last plea for the plaintiff, alleging that it was found for the defendant.

(TINDAL, Ch. J.: The issue is substantially found for the plaintiff, and, after this intimation, the Master will tax the costs for the plaintiff upon all the issues, without putting the parties to the expense of a rule.)

*Channell*, Serjt. now moved, on behalf of the defendant, for a rule to show cause why the award should not be set aside, upon the ground that there was no finding by the arbitrator upon the third issue, and therefore the award was not final. He admitted that if upon the facts the arbitrator had directed the plea of set-off should be found for the defendant, such finding would have been bad: *Moore v. Butlin* (1).

Sed per CURIAM—after referring to *Tuck v. Tuck* (2):

All the issues were virtually found for the plaintiff, and the

(1) 7 Ad. & El. 395; S. C. 7 L. J. (2) 5 M. & W. 109; S. C. 8 L. J. (N. S.) Q. B. 20. (N. S.) Exch. 165.

direction was merely a direction to the Master how to enter the verdict. A finding by an arbitrator leading by necessary inference to the decision of the issue, is sufficient. There have been several cases to that effect (1).

AVELETT  
v.  
GODDARD.

*Rule refused.*

### RUMSEY v. WEBB.

(11 L. J. C. P. 129—130; S. C. (at N. P.) Car. & M. 104.)

1842.  
Jan. 29.

[ 129 ]

Action on the case—Slander—Pleading—Evidence.

In an action on the case for words spoken of the plaintiff in her vocation as servant, *per quod* she lost her situation; plea, not guilty: Held, that the defendant, not having pleaded justification, could not offer evidence to show that the words were “innocently true.”

CASE for slander. The declaration alleged that the plaintiff, at the time when, &c. was a servant in the employ of one E. C., and that the defendant had falsely and maliciously spoken of and concerning the plaintiff, in the way of her said vocation and employment, these false, malicious, and defamatory words: “You are not aware, Mrs. C., what kind of a girl you have in your service, for I can assure you she (meaning the plaintiff) is often out with our married man.” With an averment of special damage, that the plaintiff thereby lost her situation, being dismissed by Mrs. C. from her service.

Plea: Not guilty.

At the trial, before Coltman, J., at the sittings for Middlesex, in last Hilary Term, Mrs. C., the mistress of the plaintiff, proved the speaking of the words laid in the declaration, by the defendant, who was a neighbour, and that she in consequence made inquiries, which satisfied her that there had been no serious misconduct on the plaintiff's part, but that she had, nevertheless, dismissed her from her service. The words were not set out in the declaration with any innuendoes; and the defendant's counsel, disavowing any intention of imputing any impropriety to the plaintiff, proposed to call evidence to show, that the words spoken were “literally and innocently true:” viz. that the plaintiff had sometimes walked with a married man, in the service of the defendant, upon a Sunday morning. COLTMAN, J. refused to admit the evidence, and left it to the jury to say, whether the words were spoken with a view of giving a neighbour important information, or whether they were

(1) See *Duckworth v. Harrison*, 51 L. J. (N. S.) Exch. 41, and the cases E. R. 671 (4 M. & W. 432; S. C. 8 there cited.

RUMSEY  
v.  
WEBB.

uttered as idle gossip, in which latter case he directed them to find for the plaintiff (1). Verdict for the plaintiff, damages 10s., and his Lordship certified for costs.

*Shee*, Serjt. now moved for a new trial, on the ground, that the evidence had been improperly rejected. As the words spoken were not in themselves actionable, and were not accompanied in the declaration with any innuendo making them so, the plaintiff was bound to prove that there was malice in fact; and, therefore, the defendant might properly show that they were not spoken maliciously; and this she would have done by proving the truth of the words spoken, not as a justification of any imputation against the plaintiff, but as showing that no imputation was in fact made or intended. Matter material in disproof of the allegation which the plaintiff is bound to prove, is admissible, though there be no plea of justification: *Manning v. Clement* (2).

(TINDAL, Ch. J.: That was not an attempt to prove the truth of the words spoken, but to negative the inducement, which, before the new rules, was put in issue by the plea of not guilty.)

Here the plea raises the question whether the words were spoken maliciously, which question the learned Judge left to the jury; and if the jury had known that the words spoken were true, they might have concluded, that the communication was not malicious or idle gossip, but spoken under circumstances which would make it privileged, in which case the defendant would have been entitled to a verdict: *Bromage v. Prosser* (3).

TINDAL, Ch. J.:

I think this case has been left to the jury as favourably as possible for the defendant: for I do not see any ground for supposing it to be a privileged communication; and if it were, then it matters not whether the words spoken were true or not. However, it was left to the jury to say, in effect, whether this was a privileged communication, and the jury found it was not. The

(1) [COLTMAN, J. said: "If a neighbour makes inquiry of another respecting his own servants, that other may state what he believes to be true; but the case is different when the statement is a voluntary act; yet, even in this case, the jury is to consider whether the

words were dictated by a sense of the duty which one neighbour owes to another": *Car. & M.* p. 105.]

(2) 33 R. R. 507 (7 Bing. 362; S. C. 9 L. J. C. P. 60).

(3) 28 R. R. 241 (4 B. & C. 247; S. C. 3 L. J. K. B. 203).

words are actionable, inasmuch as they are spoken of the plaintiff in her vocation; and by a long series of cases, commencing with *Underwood v. Parkes* (1), it has been well established, that the truth can never be given in evidence in an action for slander, unless a plea of justification be put upon the record.

RUMSEY  
F.  
WEBB.

ERSKINE, J.:

[ 130 ]

Possibly, if it had been conceded on the part of the plaintiff, that this communication was privileged, and the only ground on which she had sought to recover damages had been by proof of actual malice, and that the words were not true, it might have been open to the defendant to have offered evidence to rebut such evidence on the part of the plaintiff. But this was not the ground of the action. It was for words spoken of the plaintiff, as a servant, by which she lost her situation; and the general issue in such case only puts in issue the speaking of the words of the plaintiff in such character of servant.

MAULE, J.:

I concur in thinking there is no ground for disturbing this verdict. Before the new rules, it was competent for the defendant to offer evidence to negative that which was matter of inducement; but since the new rules, the plea of not guilty puts in issue only the fact that the defendant spoke the slanderous words; and slanderous words (which these are, being spoken of the plaintiff, in her situation as servant, which she lost thereby,) must be taken to be falsely and maliciously spoken in the eye of the law, unless justified by a plea stating them to be true. I do not agree, that if the plaintiff in this case had called evidence to show that the words were not true, that the defendant would, on that account, have been at liberty to show that they were true. I do not think the plaintiff, on these pleadings, would have been entitled to give such evidence. The plaintiff need not have alleged, that the words were spoken falsely in this case; and, therefore, the truth or falsehood is not put in issue by the plea of not guilty.

*Rule refused.*

(1) 2 Stra. 1200.



## MAGISTRATES' CASES.

1842.  
June 4.

*In the  
Common  
Pleas.*  
[ 125 ]

WORGE AND OTHERS *v.* RELF.

(11 L. J. M. C. 125—127.)

Churchwardens and overseers—Poor law guardians—Parish property—5 & 6 Will. IV. c. 69.

The Union and Parish Property Act, 1835 (5 & 6 Will. IV. c. 69), does not transfer the legal estate in parish property from the churchwardens and overseers to the guardians of the union, of which the parish forms a part.

Where a title, not complete in the parish officers at the time of the passing of that Act, is afterwards completed by a twenty years' possession, the legal estate so obtained vests in the churchwardens and overseers, and not in the guardians; and possession obtained by the guardians enures to the benefit of the churchwardens and overseers.

TRESPASS by the plaintiffs, as churchwardens and overseers of the poor of the parish of Battle, in the county of Sussex, against the defendant for breaking and entering into certain closes of the plaintiffs, as churchwardens and overseers, the closes then belonging to, and situate and being in the said parish of Battle.

Pleas: First, not guilty; secondly, that the closes were not the closes of the plaintiffs, as such churchwardens, &c.; thirdly, that the closes did not belong to the parish; fourthly, that the closes were the closes, soil and freehold, of the defendant.

The plaintiffs, by their replication, joined issue on the first three pleas, and traversed the fourth plea, on which traverse issue was joined.

At the trial, before Gurney, B., at the last Sussex Spring Assizes, it was proved for the plaintiffs, that the closes in question were leased by the lord of the manor to a person of the name of Veness, for the term of twenty-one years, expiring in 1811. In 1807, the parish of Battle purchased the remainder of the lease for 100*l.* from Veness. Veness continued to occupy the land, and paid rent to the parish from 1807 to 1811; also in 1825 and 1828. There was no proof of any payment of rent from 1811 to \*1825, nor after 1828. In 1831, Veness quitted possession and went to live at Brighton. It was proved, that he had in that year stated, that he had parted with his interest in the property to the parish. It was also shown that he had, at various periods during his occupation, received parochial relief. He died in 1833. In 1837, his son, T. Veness, for the first time, made an entry upon the land, but was ejected by a magistrate's warrant. In 1840, he made another entry and was similarly ejected, possession having, in both cases, been given to

[ \*126 ]

the agent of the poor law guardians of the union to which Battle belonged. In 1836, the property in question was sold by auction by order of T. Veness, and the defendant, having become the purchaser, made the entry upon the land, for which the action was brought. At the close of the plaintiffs' case, the defendant's counsel applied for a nonsuit, on the grounds, first, that the churchwardens and overseers had not shown any title in themselves; secondly, that by 5 & 6 Will. IV. c. 69, the legal estate (if any) was in the guardians of the union, and not in the churchwardens and overseers of the parish. The learned Baron overruled the first objection, but reserved leave to the defendant to move to enter a nonsuit on the second point, and the plaintiff had a verdict.

WORGE  
v.  
RELF.

*Shee*, Serjt. in Easter Term last, obtained a rule *nisi* for a nonsuit accordingly, or for a new trial upon the first point.

*Channell*, Serjt. (*Bramwell* with him) now showed cause :

The plaintiffs have been in possession of the property a sufficient time to confer a title upon them, whether they claim as churchwardens or as individuals. Even supposing that they could not begin to acquire a title before 1819, when the statute 59 Geo. III. c. 12, was passed, which empowered churchwardens and overseers to hold parish lands, yet their title would in that case be complete in 1889. This action was not begun till 1841. This is an answer to the first point, as regards a new trial. As to the second objection, that the legal estate is in the guardians of the union, and not in the churchwardens and overseers of the parish, this objection has been overruled by the case of *Doe d. Norton v. Webster* (1), which decides that neither the 4 & 5 Will. IV. c. 76, s. 21, nor the 5 & 6 Will. IV. c. 69, s. 3, divests the churchwardens and overseers of the parish property. Those parties were therefore the proper persons to be plaintiffs in this action.

*Shee*, Serjt. (with whom was *Wordsworth*) *contra* :

The plaintiffs sue in their corporate capacity as churchwardens and overseers. But until 1819, they were not competent to acquire a title to these premises in their corporate capacity. That title would not, therefore, have become complete till 1839, by twenty years' possession. But before that time, viz. in 1834, by the statute 4 & 5 Will. IV. c. 76, s. 26, the parish of Battle has been

(1) 34 R. R. 597 (12 Ad. & El. 442; S. C. 9 L. J. (N. S.) Q. B. 373).

WORGE  
v.  
RELF.

incorporated with other parishes, and the management of it was vested in a board of guardians; and in 1835, the statute 5 & 6 Will. IV. c. 69, was passed, giving most extensive powers to the board of guardians with respect to the sale, &c. of lands, the property of any parish. *Doe d. Norton v. Webster* is not applicable to the present case. There the legal estate had vested in the churchwardens and overseers of the parish; and that case decided only, that where it had once so vested, it is not divested and given to the guardians by 5 & 6 Will. IV. c. 69, s. 3. But here the legal estate was not vested in the churchwardens and overseers at the time of the passing of that Act. The title was then *in fieri* only, and the case cited is no authority to show, that when the title was afterwards completed by twenty years' possession, it did not vest in the guardians of the union. Section 7 of the statute empowers the guardians of the poor of every union and of every parish placed under the controul of a board of guardians, "to accept, take, and hold, for the benefit of such union or parish, any buildings, lands," &c.

(MAULE, J.: That means only, that the guardians of a union may take for the benefit of the union; and the guardians of a parish placed under the controul of a board of guardians, but not incorporated into a union, may take for the benefit of the parish. But there is nothing in the statute to show that the churchwardens and overseers of a parish cease to be a corporation capable of acquiring land. You ought to show that this property was divested out of the parish and given to the union, and upon that point *Doe d. Norton v. Webster* is against you.)

[ 127 ]

At all events, the plaintiffs were bound to prove possession in themselves. The only possession proved in 1837 and 1840 was the possession of the board of guardians. It was their agent to whom possession was delivered under the warrant of the magistrates.

(MAULE, J.: The guardians had the management of the property for the churchwardens and overseers, and had a right to complain of the trespass and obtain possession of the land; but when obtained, it enured, according to the title, to the benefit of the parish.)

TINDAL, Ch. J.:

The question in this case is, whether the proper plaintiffs have been put upon the record. It has been argued, that they were not

created a corporation capable of gaining a title to land, until 1819. That may be so, but from that time the title would go on ; and it is clear from *Doe d. Norton v. Webster*, that the statute 5 & 6 Will. IV. c. 69, did not take the land out of them. The point raised, that possession was given under the magistrates' warrant to the guardians, and not to the present plaintiffs, has received its answer from my brother MAULE.

WORGE  
r.  
RELF.

COLTMAN, J. and CRESSWELL, J. concurred.

*Rule discharged.*

## IN THE QUEEN'S BENCH.



1840.

[ 328 ]

## EX PARTE SCOTT AND MORGAN.

(8 Dowling, Pr. Cas. 328—329; S. C. 4 Jur. 579.)

One writ of *mandamus* cannot issue at the instance of two persons for the enforcement of separate claims, although they have been successors in the same office in respect of which the claims arise.

[ \*329 ]

CHANNELL moved for a *mandamus* to the churchwardens of the parish of Lambeth, to pay to Messrs. Scott and Morgan the arrears of their salary, to which they were entitled by a certain local Act for their services as clergymen, in the performance of certain duties within the parish. By the 53 Geo. III. which was a local Act, a power was given to the rector to appoint a clergyman to visit the poor at the workhouse. This clergyman was to be paid by the churchwardens out of the church rate. In 1833, Mr. Scott, who was a clergyman, was appointed to perform those duties, and he continued to perform them, until the month of June, in the year 1838. No salary was paid him during that time. In the month of June, 1838, Mr. Morgan was appointed in lieu of Mr. Scott. He had continued to \*do the duty from that time to the present moment, but had received no part of his salary. The object of the application was to compel the churchwardens to pay the salary due, or to make a rate for that purpose.

COLERIDGE, J. :

You cannot have one writ on behalf of both these parties. You must have a separate writ for each. As to Mr. Scott, has there not been some *laches* ? He is here, in the year 1840, seeking to compel the inhabitants of the parish, to pay what ought to have been paid in the year 1837.

Channell, at the suggestion of the Court, only took the writ in the case of Morgan.

*Rule accordingly.*

## CHICK v. SMITH.

(8 Dowling, Pr. Cas. 337—340; S. C. 4 Jur. 86.)

1840.

[ 337 ]

Where a defendant died between eleven and twelve o'clock in the morning, and a writ of *fi. fa.* was sued out against his goods between two and three the afternoon of the same day, the Court set the writ aside as irregular.

*R. V. RICHARDS* showed cause against a rule, for setting aside a writ of *fi. fa.*, on the ground, that it had issued after the death of the defendant. The defendant died on the 16th of December, between eleven and twelve o'clock in the morning. The writ of *fi. fa.* was issued between one and two in the afternoon of the same day, and tested the same day. It was contended, that the Court would not divide a day into fractions. In the case of *Thomas v. Desanges* (1), where the sheriff took possession under a *fi. fa.*, and at a later hour of the same day, the defendant surrendered in discharge of his bail, and afterwards lay in prison two months, and thereby committed an act of bankruptcy; and, by the statute \*of James, he was a bankrupt from the time of his arrest, it was held, that in an action by his assignees to recover the value of such goods, the Court would notice the fraction of a day; and, therefore, that the sheriff having entered, before the bankrupt had surrendered in discharge of his bail, the assignees were not entitled to recover. That case was distinguishable from the present, because the question in it was with respect to the interests of third persons. Lord TENTERDEN, in that case, expressly founded his decision on that reason. If the question had been between the assignees and the bankrupt, that decision most probably would not have been pronounced. In the present case it did not appear that the interests of third persons were at all affected. In the case of *Watson v. Maskell* (2), the plaintiff obtained a verdict at the Spring Assizes; the defendant died on the 18th of April; costs were taxed on the 21st; final judgment signed on the 22nd, and a *fi. fa.* issued on the same day, tested on the first day of the Term. The Court refused to set aside the *fi. fa.* for the irregularity. There, TINDAL, Ch. J. said, "the plaintiff is brought here to defend the *fi. fa.*, which, on the face of it, is regular. The objection should have been to the judgment." From this case, it clearly appeared that if the *fi. fa.* was good on the face of it, the Court would not inquire into the circumstances under which, or the time when it issued. Here, on the face of it, the *fi. fa.* appeared to

[ \*338 ]

(1) 2 B. &amp; Ald. 586.

(2) 2 Dowl. P. C. p. 810.

CHICK  
v.  
SMITH.

have been duly issued, no ground, therefore, existed for setting it aside.

*Chilton*, in support of the rule :

[ \*339 ]

It was admitted, on the other side, that the defendant died before the actual issue of the writ. Previous to the statute of 3 & 4 Will. IV. c. 67, s. 2 (1), which enabled parties to *teste* writs of execution on the day, on which, the same are issued, they could only be tested in Term time. If a party chose to avail himself of this Act, he must comply strictly with its terms. He might, however, still avail himself of his common law right, for, in *Brocher v. \*Pond* (2), it was held, by the Court of Exchequer, that a *fi. fa.* on a judgment signed after the defendant's death in vacation, may be tested on the last day of the preceding Term, notwithstanding the 3 & 4 Will. IV. c. 67, s. 2. The case of *Watson v. Maskell* was distinguishable from the present case. There, both judgment and execution were of the Term generally. The plaintiff here had not availed himself of his common law right, but had endeavoured to avail himself of the statute. In doing this, he was bound to comply strictly with the statute, and, therefore, to *teste* the writ exactly of the time, at which it issued. Not having done so, the writ was irregular. Although in general, the law would not look to a fraction of a day, yet, where injustice would be the consequence, it would notice a fraction. In the case of *Roe d. Wrangham v. Hersey* (3), which was an action of ejectment, on the demise of an heir by descent, the demise was laid on the day his ancestor died, and it was held well enough after verdict. The Court there said, "by fiction in law, the whole Term, the whole time of the Assizes, and the whole session of Parliament, may be, and sometimes are, considered as one day, yet the matter of fact shall overturn the fiction, in order to do justice between the parties." Again, in *Sadler v. Leigh* (4) where goods were seized under a *fi. fa.*, the same day that the party committed an act of bankruptcy, it was held to be open to inquire at what time of the day the goods were seized, and the act of bankruptcy was committed, as the validity of the execution depended upon the priority. In *Smallcomb v. Buckingham* (5), it was held, that where two writs of a *fi. fa.* are delivered to the sheriff on the same day, and he executes the last writ first, the execution is good, but the sheriff is liable to the plaintiff in the first. The case of *Thomas v. Desanges* was to the same effect.

(1) See now R. S. C., Ord. XLII. (3) 8 Wils. 274.  
r. 14. (4) 4 Camp. 197.  
(2) 2 Dowl. P. C. p. 472. (5) 1 Salk. 320.

PATTESON, J. :

Suppose the suing out of the writ and the death of the party were at the same instant ?

CHICK  
v.  
SMITH.

*Chilton :*

[ 340 ]

That would be irregular, as it would appear that the writ had not been issued before the death of the defendant.

PATTESON, J. :

I think, *quâcunque viâ*, the rule must be made absolute. If no fraction of a day is to be considered, I must take the death and the issuing of the writ to be contemporaneous ; whereas the writ ought to have been issued before the death of the defendant. But I need hardly put the case on that point. The good sense of the matter is, that where it is necessary to show which was the first of two acts, the Court is at liberty to consider fractions of a day. The rule of law would otherwise be absurd. In the present case, the rule must be discharged with costs, if no action is brought, but without costs, if the parties think proper to avail themselves of their right of action.

*Rule absolute accordingly.*

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## EX PARTE WHITMARSH.

(8 Dowling, Pr. Cas. 431—433 ; S. C. 4 Jur. 823.)

1840.

[ 431 ]

The Court will not grant a rule *nisi* for a *mandamus* to compel justices to issue their warrant to levy expenses of cutting a hedge, pursuant to 5 & 6 Will. IV. c. 50, s. 65, unless it appears that a demand has been made of the expenses from the person sought to be charged, and that the justices were informed of that demand.

*BIGGS ANDREWS* moved for a rule to show cause, why a writ of *mandamus* should not issue, directed to certain justices of the county of Norfolk, commanding them to issue their warrant against a person named Brooke, in order to levy the expenses of cutting a hedge by the surveyor of the highways, pursuant to 5 & 6 Will. IV. c. 50, s. 65. The words of that section were, “that if the surveyor shall think that any carriage-way or cart-way is prejudiced by the shade of any hedges, or by any trees (except those trees planted for ornament or for shelter to any hop-ground, house, building, or court-yard of the owner thereof) growing in or near



Ex parte  
WHITMARSH.

[ \*432 ]

such hedges or other fences, and that the sun and wind are excluded from such highway to the damage thereof, or if any obstruction is caused in any carriage-way or cart-way by any hedge or tree, it shall be lawful for any one justice of the peace, on the application of the said surveyor, to summon the owner of the land on which such hedges or trees are growing next adjoining to such carriage-way or cart-way, to appear before the justices at a Special Sessions for the highways, to show cause why the said hedges are not cut, pruned, plashed, or such trees not pruned or lopped in such manner that the carriage-way or cart-way shall not be prejudiced by the shade thereof, and that the sun and wind may not be excluded from such carriage-way or cart-way to the damage thereof, or why the obstruction caused in such carriage-way or cart-way should not be removed; and the question as to the cutting, pruning, or plashing such hedges, or the \*pruning and lopping such trees, or the removal of such obstruction as aforesaid, shall, upon proof of the service of such summons, and whether the said owner attend or not, be determined at the discretion of such last-mentioned justices; and if such justices shall order and direct that such hedges shall be cut, pruned, plashed, or such trees pruned or lopped, in manner aforesaid, or such obstruction removed, the said owner shall comply therewith within ten days after a copy of such order shall have been left at the usual place of abode of the said owner, or of his steward or agent, and in default thereof, shall forfeit, on conviction, a sum not exceeding forty shillings; and the said surveyor, if the order of the said justices is not complied with, shall, and he is hereby authorized and required to cut, prune, or plash such hedges, and to prune and lop such trees, for the benefit and improvement of the highway, and to remove such obstruction as aforesaid, to the best of his skill and judgment, and according to the true intent and meaning of this Act; and the said surveyor shall be reimbursed by the owner as aforesaid, what charges and expenses he shall be at in cutting, pruning, and plashing such hedges, and pruning and lopping such trees, and the removal of such obstruction over and above the said forfeiture; and it shall and may be lawful for the justices at a Special Sessions for the highways, upon proof to them made upon oath, to levy as well the expenses of cutting, pruning, and plashing such hedges, or pruning and lopping such trees, or removal of such obstructions as aforesaid, as the several and respective penalties hereby imposed, by distress and sale of the offender's goods and chattels, in such

manner as distresses and sales for forfeitures are authorised and directed to be levied by virtue of this Act." It appeared, by the affidavits, that the hedge in question belonged to a person named Brooke, in the parish of Haskedon, and overhung the highway. He was required by the surveyor to prune it, and an order to that effect was made by the justices at Petty Sessions, but he refused to do so. He was then convicted in a penalty of five shillings, which he paid. The surveyor again called on him to \*prune the hedge, and he again refused. They then told him that they must employ some one to cut the hedge. They did so, and the expense amounted to seven shillings and eleven pence. The magistrates were then called upon to issue their warrant of distress. This they refused to do, and the present application was, therefore, made for a *mandamus*, to compel them to issue their warrant. Whether the Court would grant this application must, of course, depend on the language of sec. 65. From the construction fairly to be put upon that section, the surveyors were entitled to have the assistance of the Court by a writ of *mandamus*, in order to enforce the payment of the sum which they had expended in cutting the hedge.

Ex parte  
WHITMARSH.

[ \*433 ]

COLERIDGE, J. :

It is not sworn that an application was made to Brooke for the amount of these expenses, or if it was, that the magistrates were informed of it. I must assume that the magistrates were informed of all the steps that had been taken. But it would be very hard if a warrant should be issued to levy these expenses by distress, until a demand had been made for them upon Brooke. A *mandamus*, therefore, would hardly be allowed to issue to compel the magistrates to grant their warrant, unless it was shown that they had been informed that a demand of the expenses had been made upon Brooke. I think, I ought not, therefore, to grant a rule.

*Rule refused.*

# JONES v. ARTHUR.

(8 Dowling, Pr. Cas. 442—443; S. C. 4 Jur. 859.)

1840.

[ 442 ]

If a tender is made by a cheque contained in a letter requesting a receipt in return, and the plaintiff sends back the cheque, and without objecting to the nature of the tender, demands a larger sum, it is a good tender.

E. L. RICHARDS showed cause against a rule *nisi*, obtained by Martin, for a new trial, in a cause tried before the sheriff on a writ

JONES  
v.  
ARTHUR.

[ \*443 ]

of trial. The defendant had pleaded a tender, and on it, issue was joined. A verdict was found for the plaintiff. The evidence given of the tender was a letter written by the defendant to plaintiff, containing a cheque for the sum of 5*l.*; the letter stating that that sum was the right amount, and requiring a receipt to be sent in return. The plaintiff returned the cheque in a letter, in which he stated, that he would not receive that amount, and requested to have a cheque for 5*l.* 7*s.* 6*d.* No objection was stated in the letter to the tender, on the \*ground of its being by a cheque. At the trial it was proved that a sum of 5*l.* only was due. The present rule was obtained, on the ground that the tender was not good, it being by a cheque. *E. L. Richards* contended, that as the cheque was sent by a letter, no opportunity was afforded by the defendant to object to the mode in which the tender was made, and consequently the answer by the plaintiff did not amount to an adoption of the cheque. The demand of the receipt must be considered as a condition attached to the tender, which vitiated it.

*Martin* submitted, that as no objection had been taken to the tender, on account of its being by cheque, it must be considered as a good tender, it having, in fact, been adopted by the plaintiff himself. He cited *Wilby v. Warren* (1).

COLERIDGE, J. :

Here, there was a cheque sent, and it is urged that the plaintiff did not object to the money being tendered in the form of a cheque, but merely to the amount of it. That is the same as if the tender had been made in person. The plaintiff has waived every objection to the nature of the tender. Then I agree, that if it was subject to a condition, it would be a bad tender. But the defendant put the cheque entirely out of his power, by sending it in a letter, and he merely requests the plaintiff to send him a receipt, which was not a condition. I think, therefore, it was a good tender, and the rule must be made absolute.

*Rule absolute.*

(1) Tidd's Prac. 187, ed. 9; Rosc. Ev. 349, ed. 5.

HUGHES *v.* BUDD.

1840.

(8 Dowling, Pr. Cas. 478—482; S. C. 4 Jur. 654.)

[ 478 ]

If an agreement cannot be read in evidence for want of a stamp, the plaintiff cannot recover the value of the work and labour to which the agreement refers, although the defendant may have had the benefit of it.

An agreement signed by the plaintiff only is, as against him, valid in point of law as an agreement, and must, therefore, be stamped.

V. *WILLIAMS* showed cause against a rule *nisi*, obtained by *Tyrchitt*, for a nonsuit or a new trial. The case was tried before the under-sheriff for the county of Glamorganshire, and a verdict found in favour of the plaintiff. The declaration contained a count for work and labour, and a count on an account stated. The defendant pleaded, except as to the sum of 2*l.* 6*s.*, the general issue. As to the 2*l.* 6*s.*, a set off. At the trial, a memorandum was put in by the plaintiff, in support of his case, in this form: "A memorandum of agreement between Isaac Hughes, quarryman, and the Ystalefera Iron Company, that is the said Isaac Hughes, quarryman, do engage to quarry a sufficient quantity, at Craig Grew, to complete a dry wall, which is to be erected from the Canal Bridge to the Swansea Road, which wall is to continue both sides of the New Road, as above mentioned; the stones are to be of a good and proper quality for the said walling, at the rate of two shillings per perch, 36 cubic feet to the perch. As witness my hand, this 5th day of January, 1839, ISAAC HUGHES. Witness, J. JONES." This memorandum was not stamped, and was only signed by the plaintiff. An objection was taken, that as it was an agreement between the plaintiff and the defendant, it ought to be stamped; that it was the only evidence of the agreement, and, therefore, no other evidence was admissible. The under sheriff took a note of the objection, and gave leave to the defendant to move to \*enter a nonsuit, if the Court should be of opinion that the instrument required a stamp. It was then received in evidence, and the cause proceeded. The question, therefore, for the consideration of the Court was, whether this writing required a stamp? *Williams* submitted, that this instrument must either be considered as a memorandum for the hire of an artificer, or a memorandum relating to the sale of goods, wares, or merchandizes. And, therefore, coming within the exemptions under the head of "Agreements," in the 55 Geo. III. c. 184 (1), and consequently not requiring a stamp.

[ \*479 ]

(1) See now Stamp Act, 1891 (54 & 55 Vict. c. 39), Sch. tit. Agreement and s. 22.—A. C.

HUGHES  
v.  
BUDD.

If it could not be so considered, then it must be regarded as only amounting to an offer, and, therefore, not requiring a stamp, as in *Drant v. Browne* (1), where A. entered into a written agreement with B., for the hire of a piece of land for the purpose of making bricks. C. afterwards made an offer, in writing, to let another piece of land to A., upon the terms contained in the agreement between him, A. and B.,; and at a subsequent time, A. verbally accepted this offer. In an action by C., for a breach of some of the terms in this contract, it was held that the written offer, made by C., was admissible in evidence without being stamped. In the present case also, there was an acceptance by parol, pursuant to the proposition made by the plaintiff. There, Mr. Justice BAYLEY said, "the Stamp Act only applies to agreements or minutes, or memorandums of agreements; and, therefore, unless the paper in question contained an agreement, or a minute, or a memorandum of agreement, it did not come within the operation of that statute. That paper contained a mere proposal to let the land, according to the terms contained in another paper, which was stamped; and the parties ultimately agreed to those terms by parol. The second paper, therefore, contained neither an agreement, nor a minute, or memorandum of agreement." That case was a sufficient authority to show that the instrument here did not require a stamp. Again, the present instrument was \*only binding on the plaintiff, and, therefore, could not be considered as an agreement. But even if it was, the defendant having received the benefit of the work and goods in question, the plaintiff had a right to recover their value. For these reasons, the present rule ought to be discharged.

[ \*480 ]

*Tyrwhitt*, in support of the rule, contended, that the plaintiff was not entitled to proceed any farther after the production of the unstamped agreement, and it was impossible for him to prove his case, without producing it. The case was, therefore, distinguishable from that of *Stevens v. Pinney* (2), where the plaintiff was enabled to establish his case by other evidence, without producing the agreement; and, therefore, the plaintiff was not precluded from recovering, by the defendant's proving the existence of an unstamped and unsigned agreement, which the defendant did not give notice to the plaintiff to produce (3). The question then was,

(1) 3 B. & C. 665; 5 Dowl. & Ry. 582.

(2) 30 R. R. 555 (8 Taunt. 327; 2 Moore, 349).

(3) See *Fielder v. Ray*, 31 R. R. 429 (3 Moo. & P. 659; 6 Bing. 332); *Rees v. Padstow*, 4 B. & Ad. 209; 1 Nev. & M. 9.

whether this must not be considered an agreement? It could, in fact, be considered in no other light, except on the ground that it had been signed by the plaintiff only. In the case of *Schneider v. Norris* (1), that was held to be immaterial. There, Mr. Justice DAMPIER, said: "Here there is the handwriting of the party to be charged to the bill of parcels, which authenticates it as a memorandum of the bargain. The defendant has ratified the sale to Schneider & Co., by inserting their names, as buyers, to a paper in which he recognizes himself as seller. That is sufficient to satisfy the object of the statute." The case of *Laythoarp v. Bryant* (2) was to the same effect. Then as to the objection, that it was competent for the plaintiff to recover the value of work and labour, notwithstanding the agreement could not be read in evidence, the \*case of *Brewer v. Palmer* (3) was a sufficient authority to the contrary. Under these circumstances, the present rule ought to be made absolute.

HUGHES  
BUDD.

[ \*481 ]

WILLIAMS, J. :

It seems to me that the whole question is, whether this paper was essential in support of the plaintiff's case? If it was, and required a stamp, it ought to have been stamped at the time of the trial. In the case of *Brewer v. Palmer*, which was an action for use and occupation, it was held by Lord ELDON that, where it was proved that the premises had been demised by an agreement in writing, but not on stamped paper, the plaintiff was bound to give the writing in evidence; and if not stamped at the trial, the plaintiff must be nonsuited, and could not be allowed to recover for use and occupation generally. It has been contended in the present case, that, even if the agreement could not be made evidence, the plaintiff would be entitled to recover on a *quantum meruit*. The case of *Brewer v. Palmer*, however, is a direct authority against that proposition. That case is in terms applicable to the present, provided in this case the memorandum required a stamp. But it is said that it was not necessary that it should be stamped, either because it was an agreement with an artificer for his hire, or a memorandum relating to the sale of goods. In my opinion it falls between the two, and is something composed of both. It is not to work generally, but to do a particular kind of work. Neither is it for goods sold and delivered;

(1) 15 R. R. 250 (2 M. & S. 286). 3 Scott, 238).

(2) 42 R. R. 709 (2 Bing. N. C. 735; (3) 3 Esp. 213.

HUGHES  
v.  
BUDD.

[ \*482 ]

but it is to work on a particular mass of stone. It is said, however, that it is no agreement, because it is only signed by one party to it. But it seems to me that the necessary operation of it is a contract between the parties, and the observations of Mr. Justice DAMPIER in *Schneider v. Norris*, seem to me to be precisely in point. On the authority of that case, in my opinion this was a written document, establishing an agreement \*between the parties, on which the whole cause of action depended. As the plaintiff could not proceed, after the production of the agreement, which could not be read for want of a stamp, the present rule must be made absolute for entering a nonsuit.

*Rule absolute.*

1840.

[ 598 ]

### HARVEY v. HEWITT.

(8 Dowling, Pr. Cas. 598—599; S. C. 4 Jur. 292.)

It is competent for the Court to receive the affidavits of persons who swear of their own knowledge to the fact of jurymen misconducting themselves by drawing lots for the verdict, although statements by the jurors themselves could not be received.

*WIGHTMAN* showed cause, against a rule obtained by *Ramshay*, calling on the defendant to show cause why the verdict found in his favour, before the under-sheriff of Cumberland, should not be set aside, and a new trial granted, on the ground of misconduct on the part of the jury. The alleged misconduct consisted in drawing lots for the verdict. This was deposed to by the sheriff's bailiff, who had the charge of the jury when they were locked up, and also by three persons, who, from the adjoining room had heard through a thin partition, the jury make an agreement to draw lots, and actually do so. *Wightman* contended, that all the statements here made were merely hearsay evidence of what had passed among the jurymen. It had been decided, that if jurymen themselves made a statement on oath of their drawing lots or other misconduct, the Courts would not receive such a statement. In the case of *Straker v. Graham* (1), the Court of Exchequer decided, that they could not receive an affidavit made by an attorney, in which he stated, that he had been informed by one of the jury that they had decided upon their verdict by tossing up. There Lord ABINGER, C. B., said, "it would be improper to receive the affidavit of a jurymen; and certainly everything that would go to reject that, would equally

apply to the exclusion of this, which is merely hearsay evidence of his statement."

HARVEY  
".  
HEWITT.

*Ramshay*, *contra*, was stopped by the COURT.

[ 599 ]

COLERIDGE, J. :

I think that this rule must be made absolute. This case is quite distinct from the one cited. No doubt if the verdict was procured as alleged it was a bad verdict. No doubt, also, that we cannot take the affidavit of a juryman stating his own misconduct, or that of his brother jurymen, nor can we, as in the case quoted, take the hearsay statement of one of the jurors with respect to the misconduct of the jury. The affidavits here produced, however, are not made by the jurors themselves, nor by persons who have received information from the jurors; but they are the affidavits of persons who witnessed the transaction itself, of agreeing to draw lots, and drawing lots. Unless, therefore, I disbelieve these four witnesses, which I cannot, this rule must be made absolute for a new trial.

*Rule absolute.*

## REG. v. THE LORD OF THE MANOR OF BISHOP'S STOKE.

1840.

(8 Dowling, Pr. Cas. 608—612; S. C. 4 Jur. 630.)

[ 608 ]

The steward of a manor is not bound to accept a general surrender of tenements, without describing particularly what the tenements are, although the proposed surrender refers to a previous surrender, in which there was a description of the tenements.

*Semble*, that it is a good custom for the steward to prepare all surrenders in a manor for a reasonable fee.

*ERLE* and *Peacock* showed cause, against a rule *nisi*, obtained by *Thesiger*, for a *mandamus*, to be directed to the lord of the manor of Bishop's Stoke, and his steward, to take a surrender, and enrol it, of certain lands within the manor. There was no objection on the part of the lord or his steward to take the surrender according to the usual form of the manor, but an objection was made to take a surrender in the manner proposed by the applicant. It was also contended by the applicant, that he had a right to prepare the surrender. As this course had not been usual hitherto, the steward objected to it. It appeared, from the affidavits, that for certain purposes, in which the father and son were interested, it was necessary that the father should surrender certain copyhold tenements, in number twenty-eight, to the use of

[ \*609 ]



REG.  
v.  
THE LORD  
OF THE  
MANOR OF  
BISHOP'S  
STOKE.

the son, and then that the son should surrender those tenements again. It was proposed, on the part of the applicant, that the surrender by the son, instead of describing what the tenements were, which were proposed to be surrendered, and which had been surrendered by the father, and in his surrender described, should merely state generally that he surrendered all those tenements which his father had surrendered on a particular day. To this general form of surrender the steward objected, and accordingly refused to accept it. In this, it was submitted that he was justified. In case of its becoming necessary to trace title with respect to this property, it would be productive of immense confusion and difficulty, because it would be necessary to go back from surrender to surrender, until, in process of time, it might happen that it would be requisite to refer to rolls of the manor, which had been lost or destroyed. With respect to the second point, the preparation of the surrender by the steward, it was sworn to be the custom of the manor that that person should prepare the surrenders. The case of *Everest v. Glyn* (1) was an authority to show that each manor must be bound by its particular customs, as it could not be said that there was any general law for all copyholds; and the case of *Rex v. Rigge* (2) had decided that it is a good custom in a manor that the steward, or his deputy, should have the sole right of preparing all the surrenders of \*copyhold tenements within the manor. Under these circumstances, the present rule ought to be discharged.

[ \*610 ]

*Thesiger* and *Beavan* supported the rule :

The only real question in the case was, with respect to the right of the steward to prepare the surrender to the exclusion of the applicant. As to the argument of inconvenience which might possibly arise in case of the rolls of the manor becoming injured or destroyed, that could not operate against the present rule. Had the steward, in the present case, shown that there was an established custom for the steward alone to prepare the surrenders? His affidavit certainly did not show this; all that the affidavit showed was, that on several occasions he had prepared the surrenders, and that the fees varied at different times. Unless it was clearly shown that the custom interfered, the vendor and vendee had a right to prepare the surrender. In the case of *Rex v. Rigge*, the reason assigned by the Court why it was a good

(1) 16 R. R. 640 (6 Taunt. 426).

(2) 21 R. R. 394 (2 B. & Ald. 350).

custom that the steward should prepare the surrender was because "the steward is bound to prepare the surrender for a fixed fee." But here it appeared that the fee received by the steward was not fixed. That case, therefore, was no authority on the present.

REG.  
v.  
THE LORD  
OF THE  
MANOR OF  
BISHOP'S  
STOKE.

COLERIDGE, J. :

The words of the case in *Rex v. Rigge* are quite consistent with its being a good custom to take a reasonable fee. The custom is good for the steward to prepare the surrender, and one reason is, that he must charge a reasonable fee. But if the claim is to take an arbitrary fee, that might be a bad custom. The amount of the fees would necessarily vary, and not unreasonably, when the length of the surrender increases.

*Thesiger and Beavan :*

There was no case which decided that the custom for the steward to prepare the surrender was good, unless it was connected with a fixed fee. Here, \*however, the affidavit of the steward himself showed that the amount of it had varied at different times. As to its being reasonable, that argument could not avail any more than it would in the case of a heriot, or a *modus*. In the latter case, the reasonableness of the *modus* would be the best proof of its being a bad one.

[ \*611 ]

COLERIDGE, J. :

I take it that the rule on which the Court acts, in granting writs of *mandamus* is, that if the affidavits raise questions of disputed fact, it will grant the writ, in order that those questions may be tried; or if there are some questions of law to be put into a more solemn train of inquiry, a similar course is pursued. But if the arguments on both sides disclose that there is no dispute as to the facts, and the Court, which has to decide on the particular question, has no doubt in point of law, it ought not to grant the *mandamus*. It seems to me, that there is one point in this case, on which it may be disposed of. But, first, as to the matter of the steward preparing the surrender. The arguments seem to have forgotten what the title of the copyholder is. Now what is the title of the copyholder? It is that which is on the Court rolls. Who is to put that there which is afterwards to form his title? If it is to be contended that every tenant's attorney has a right to have access to the roll, and put on it any title he pleases,

REG.  
v.  
THE LORD  
OF THE  
MANOR OF  
BISHOP'S  
STOKE.

[ \*612 ]

very extraordinary consequences might be the result. Has he a right to do anything with the rolls? They are the lord's property for the benefit of the tenant, no doubt, but to be kept by the steward only. I am not disposing of the case on this point, and I do not mean to say, that if there was a custom set up, that the steward should prepare the surrender coupled with a fee which was wholly unreasonable, that that would be a good custom. But I cannot think that the fact of the fee being fixed, is an integral part of the foundation of the opinion expressed by the COURT in *Rex v. Rigge*. But it seems to me, that the other point is the one on which this rule ought to be \*discharged. The affidavits on the part of the lord and the steward state, that it has been the practice to have separate surrenders, and separate documents, and to describe them as separate on the rolls. That I think is what might be expected, and convenience requires that it should be so. The other side, however, seek to introduce a mode of proceeding, from which several inconveniences must result; all that is contended in support of the application is, that in a single instance of one particular conveyance as to which there is a great deal of explanation in the affidavits, there was such a surrender as the one required. On the general ground, therefore, that the description of the tenements should appear on the roll, and no custom is set up in opposition to it, I think that the steward was justified in refusing to accept such a surrender as the one tendered. The present rule must, therefore, be discharged, but without costs, as some confusion has been introduced by the steward's varying the amount of fees taken at different times.

*Rule discharged, without costs.*

1840.

[ 623 ]

## REG. v. THE WILTS AND BERKS CANAL COMPANY.

(8 Dowling, Pr. Cas. 623—626; S. C. 4 Jur. 848.)

In order to induce the Court to issue a *mandamus* to a Canal Company, to make compensation to a claimant, a clear refusal on the part of the Company must be shown; mere delay in attending to the claim is not sufficient.

LUDLOW. Serjt., showed cause against a rule *nisi*, obtained by *Erle*, for a *mandamus*, to be directed to the Wilts and Berks Canal Company, commanding them to issue their warrant to the sheriff, pursuant to 6 Geo. IV., the Act constituting the Company, in order to assess compensation to a person named Vines, for an alleged

injury done to his mill by the works of the Company. It appeared by the affidavits that Mr. Vines was the proprietor of the mill in question. The first application he made to the Company for compensation was on the 29th of November. The applicant was then informed that there would be a meeting of the committee of management on the 26th of December, but that that would be a matter of form, as no member of the committee would attend on that day. He was also informed, that there would be another meeting of the committee in the month of March, and then his application would be submitted to them. Instead of waiting for the meeting in the month of March, he applied, on the 23rd of January, for the present rule. Under these circumstances it was submitted, that there was no sufficient refusal on the part of the Company to make the compensation required, so as to authorise the compulsory process of a *mandamus* required by the present rule. There was a power under the Act of Parliament to call a special meeting of the committee of management, before which Mr. Vines' claims might have been brought. It did not appear, however, that any application had been made that such a special meeting should be called. The applicant, therefore, in no way had placed himself in a situation to call upon the Court to grant the extraordinary remedy of *mandamus*.

REG.  
THE WILTS.  
AND BERKS  
CANAL CO.

*Erle* and *Carrington*, in support of the rule, contended, that it was incumbent on the Company to show that they were willing to make compensation to the claimant, as they \*were bound pursuant to their Act of Parliament. If the committee had really been in earnest with respect to compensating Mr. Vines, they might have called a special meeting for considering his claim. But their subsequent conduct showed a clear disinclination to do what they were required in Mr. Vines' case. A meeting took place in December, and another in March, but no single step was taken at either of those meetings towards satisfying the claim. Had the Company really intended to act fairly towards Mr. Vines, they would, at the latter meeting, have done something with respect to his claim, as they were well aware that his claim had been made. No reason could exist for not issuing the warrant, because the Company was perfectly protected with respect to costs by the bond which must be given to the Company by Mr. Vines on such an occasion. Although no formal refusal had been given by the Company to issue their warrant, the facts disclosed amounted to a substantial refusal.

[ \*624 ]

REG. COLERIDGE, J. :

<sup>v.</sup>  
THE WILTS  
AND BERKS  
CANAL CO.

I am sorry to be obliged to dispose of the rule on this preliminary objection. In the case of *Rex v. The Brecknock and Abergarennny Canal Company* (1), Lord DENMAN lays down correctly the rule as to the circumstances under which writs of *mandamus* should be granted. His Lordship there says, “ we cannot grant a *mandamus* unless there has been a direct refusal, and here, I think, there has not. It is not, indeed, necessary that the word ‘refuse,’ or any equivalent to it, should be used ; but there should be enough to show that the party withholds compliance, and distinctly determines not to do what is required.” That is the true principle on which this case must depend. The question is, whether, on the 23rd of January, when this rule was moved for, I can perceive in the conduct of the Company, or the circumstances which transpired, what amounts to a clear intention on their part \*not to do the act which they are required. I think it must be taken as clear, in this case, that this committee meets quarterly ; one meeting being held in the month of December, and another in the month of March. An application was made to the Company for compensation on the 29th of November, and a communication was made to the applicant that the next quarterly meeting would be on the 26th of December ; but that it was probable that no one would attend. The candid meaning of this was, that as the day mentioned was the day after Christmas Day, it was probable no one would attend. It was also stated, that the next effective meeting would be in the month of March. If the applicant meant to say that this was an evasive answer, he should have insisted that a notice of a special meeting should be given for the purpose of considering the claim. Then, if the clerk had said any thing which showed that the Company intended to fall back on the usual quarterly meeting, and not to summon a special meeting, that might have been a reason for forming a different view of the case. But that is not so. I cannot see any thing like an intention to do so. They do not refuse, in terms, to issue their warrant to the sheriff, and their conduct does not show an intention so to do. So much as to the conduct of the Company at the time of applying for the rule. It is said, that the subsequent conduct of the Company shows that there was no real intention on their part to make compensation to the claimant, as they were bound ; for it is remarked that they have done nothing with respect to the claim, at the meeting which took place in the

[ \*625 ]

month of March. It is said, that because the Company did nothing since, it is, therefore, clear they intended to do nothing before. That is, however, not a fair construction of the course which the Company pursued. If you take a hostile proceeding it is natural that you should alter the disposition of the parties. If they find that you are determined to bring them into the Court of Queen's Bench, and to throw away the scabbard in making \*this application, the Company may naturally say that they will await the event of the application. The rule must, therefore, be discharged, but without costs.

REG.  
THE WILTS  
AND BERKS  
CANAL CO.

[ \*626 ]

*Rule accordingly.*

# REG. v. THE LORDS OF THE MANOR OF INGLETON.

(8 Dowling, Pr. Cas. 693—701; S. C. 4 Jur. 700.)

1840.

[ 693 ]

The Fines and Recoveries Act, 1833 (3 & 4 Will. IV. c. 74), s. 53, only applies to equitable estates of tenants in tail of lands held by copy of Court roll. The Court, therefore, refused a *mandamus* to the lord of a manor, commanding him to enter on the Court rolls an indenture touching certain customary freehold hereditaments, although it appeared that the steward of the manor was accustomed to give admittances signed by him to the grantee of such hereditaments, but did not enrol the deed, by which they were granted.

W. H. WATSON showed cause against a rule *nisi*, obtained by *Armstrong*, calling on the lords of the manor of Ingleton, in the county of York, and their steward, to show cause, why a writ of *mandamus* should not issue, directed to them, commanding them to enter on the Court rolls of the said manor, \*a certain indenture touching certain customary freehold hereditaments and premises within the said manor, pursuant to the directions on the statute in such case made and provided. The present application was founded on 3 & 4 Will. IV. c. 74, s. 53. The provisions of that section were, “ That a tenant in tail of lands held by copy of Court roll, whose estate shall be merely an estate in equity, shall have full power, by deed, to dispose of such lands under this Act, in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this Act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected, shall be entered on the Court rolls of the manor of which the lands thereby disposed of may be parcel; and if

[ \*694 ]

REG.  
r.  
THE LORDS  
OF THE  
MANOR OF  
INGLETON.

there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector, either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the Court rolls; and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the Court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the Court rolls: Provided always, that every deed by which lands, held by copy of Court roll, shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the Court rolls of the manor of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the Court rolls of such manor before the subsequent assurance shall have been entered."

[ 695 ]

The previous sections, 50, 51, and 52, applied to legal estates, while this last section, 53, applied to equitable estates. No doubt existed that with respect to the property in question, the applicant, Mr. Oddie, only took an equitable estate. The question, therefore, for the decision of the Court would be, whether the lands in question, which were customary lands, could be considered as "lands held by copy of Court roll," within the meaning of the section? It would appear, in the present case, that the property in question, although customary, did not pass by surrender and admittance, and, therefore, could not be considered as held by copy of Court roll. It was shown by the affidavits, that there were no Court rolls in the manor; but that the steward merely entered the verdicts of juries on certain loose sheets, but upon them he never indorsed any entries. It was also shown, that the mode in which property of this kind was conveyed in the manor, was by deed, which the tenant executed to the alienee. The operative words of that deed were, "grant, bargain, sell, alien, surrender, and convey." This deed conveyed the estate which was to have "to the alienee, his heirs and assigns for ever, according to the custom of the manor, and under the rents, dues, duties, and services, usual and accustomed." No enrolment was made of this deed on any Court roll, but it was usual, at a subsequent Court, for the grantee to produce

the deed to the steward, who gave him an admittance on plain parchment, signed by himself. The effect of this ceremony was, to render the alienee the legal tenant. With respect to barring entails within the manor, by the legal tenant in tail, there was a customary mode, which the affidavits disclosed, on which proceeding the lords of the manor received certain appointed fees. In the present instance, the person in whom the legal estate tail was vested, was no party to this application, but, on the contrary, he objected to it. The object of the applicant must be, to have the deed in question entered on the rolls of the manor; but here, there were no rolls on which the deed could be entered. \*It was true, an act was done in Court by the steward, but that would not render the property copyhold, as it could not amount to surrender and admittance. The case of *Doe d. The Earl of Carlisle v. Towns* (1) was very important, as throwing light on tenures similar to the present. The marginal note of that case was, "Estates of inheritance in a manor were held at the will of the lord, according to the custom of the manor, subject to fines on the death of the lord or tenant, and on alienation, and to other dues. The tenant might aliene by customary bargain and sale, with the license of the lord indorsed. Courts were held twice a-year, at which new tenants, on death or alienation, were bound to appear and have their names entered on the roll, paying a shilling to the steward. On default made, the lord might seize *quousque*: Held, that such enrolment was not an admittance within the Stamp Act, 55 Geo. III, c. 184, which lays a duty on 'customary estates, passing by surrender and admittance, or by admittance only, and not by deed;' but that in case of alienation, the estates passed by the conveyance, licensed by the lord; and where the lands descended, the heir became entitled as in case of freehold: and, consequently, that a person, taking as heir, was not bound, on enrolment, to receive a stamped admittance from the steward." There Lord TENTERDEN said, "I am of opinion that these tenements do not fall within the description in the schedule, of customary estates passing by admittance only, and not by deed. It is found in the case that the tenements on this manor do pass by customary conveyance of bargain and sale. It appears to me, that the Legislature intended to lay a fine on the transfer of copyhold and customary property, when effected by deed of whatever description, or by matter of record; in the one case the stamp is imposed on the deed, in the other, where a surrender or admittance

REG.  
".  
THE LORDS  
OF THE  
MANOR OF  
INGLETON.

[ \*696 ]

(1) 2 B. & Ad. 585.



REG.  
v.  
THE LORDS  
OF THE  
MANOR OF  
INGLETON.  
[ \*697 ]

takes place and is recorded in Court, the stamp is laid upon the copy of the Court roll, to be delivered to \*the party entitled (1). But in the present case, the property did not pass by deed, the defendant taking as heir to his brother, nor did it pass by matter of record. There was simply an act in court, nothing was recorded." Mr. Justice LITLEDALE, in his judgment in the same case, observed, "the schedule lays the duty on estates which pass by surrender and admittance, or admittance only, and not by deed; excluding the latter case for a very good reason, namely, that where there are deeds the revenue is already provided for. The tenure in these manors is peculiar. It is not to hold merely according to the custom of the manor, as is generally the case with such estates in the North of England, but at the will of the lord, according to the custom of the manor: it is a customary estate of inheritance at will; it is alienated by customary bargain and sale, with the license of the lord indorsed; and it passes by the deed only, without admittance. At the Courts, which are held twice a-year, proclamation is made for heirs or alienees to appear, and their names are then enrolled; but this is not an admittance, it is only a notification of the change of tenants, in case of alienation, the title is complete on execution of the bargain and sale, and license from the lord, and when the lands pass by descent, they vest in the same manner as freehold property." That case showed that the lands in the present case could not be considered as held by copy of Court roll, for the title depended on the deed. Supposing an ejectment to be brought for the recovery of these lands, the Court rolls of this manor would be no evidence of title, because only the deed conferred title. The case, therefore, could not be considered as coming within the Act of Parliament, and consequently the present rule must be discharged.

*Armstrong*, in support of the rule:

[ \*698 ] The case cited on the other side only amounted to a decision on the Stamp \*Act. The Court there held, that such a stamp as was contended for, was not necessary. If the preamble of the Act of Parliament was considered, it would appear that the Legislature intended that the provisions of this section should extend to such a case as the present. In section 1, it was enacted, "that in the construction of this Act the word 'lands' shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents, and

(1) 48 Geo. III. c. 149, s. 33 [rep. 33 & 34 Vict. c. 99].

hereditaments of any tenure (except copy of Court roll), and whether corporeal or incorporeal, or any undivided share thereof; but when accompanied by some expression, including or denoting the tenure by copy of Court roll, shall extend to manors, messuages, lands, tenements, and hereditaments of that tenure, and any undivided share thereof."

REG.  
THE LORDS  
OF THE  
MANOR OF  
INGLETON.

(COLERIDGE, J.: I do not see how the words of that section, defining the meaning of the word "land," show that the property here comes within the meaning of the Act of Parliament.)

This must be considered as ranging itself within that class of lands which were "accompanied by some expression, including or denoting the tenure by copy of Court roll." The case of *Doe d. Reay v. Huntington* and others (1), was an authority for this construction. The marginal note of that case was, "Where the lord of a customary manor, by his deed, made since the statute *Quia Emptores*, granted to his customary tenant, who then held, by the payment of certain customary rents and other services, that in consideration of a 61 penny fine (or 61 years' rent), he, the lord, ratified and confirmed to the tenant and his heirs all his customary and tenant-right estate, with the appurtenances, &c., and granted that the tenant and his heirs should be thereof freed, acquitted, exempted, and discharged from the payment of all rents, fines, heriots, &c., dues, customs, services, and demands, at any time thereafter happening to become due in respect of the tenancy, except 1*d.* yearly rent, and also excepting and reserving suit of Court, with the service incident thereto; and saving and reserving all \*royalties, escheats, and forfeitures, and all other advantages and emoluments belonging to the seignior, so as not to prejudice the immunities thereby granted to the tenant; and also granted liberty to cut timber, and to sell or lease, &c., without license: held, that such confirmation to the tenant of his customary and tenant-right estate freed, &c., from all rents and services, except, &c., was tantamount to a release of those rents and services not specifically excepted; and that, by virtue thereof, the customary tenement became frank-free, or held in free and common socage; and that the old customary estate, which before was not devisable, was extinguished, and became thereupon devisable by the Statute of Wills. Such customary estates, which are peculiar to the north of England, are not freehold, but seem to

[ \*699 ]

(1) 4 East, 271.

REG.  
v.  
THE LORDS  
OF THE  
MANOR OF  
INGLETON.

fall under the same consideration as copyholds, though alienable by bargain and sale and admittance thereon, and not holden at the will of the lord." There, Lord ELLENBOROUGH said, "These customary estates, known by the denomination of tenant-right, are peculiar to the northern parts of England, in which, border serving against Scotland were anciently performed, before the union of England and Scotland under the same sovereign. And although these appear to have many qualities and incidents which do not properly and ordinarily belong to villenage tenure, either freed or privileged, (and out of one or other of these species of villenage all copyhold is derived), and also have some which savour more of military tenure, by escuage uncertain, which, according to Littleton. sec. 99, is knight's service; and although they seem to want some of the characteristic qualities and circumstances which are considered as distinguishing this species of tenure, namely, the being holden at the will of the lord, and also the usual evidence of title by copy of Court roll, and are alienable also, contrary to the usual mode by which copyholds are aliened, namely, by deed and admittance thereon (if indeed they could be immemorially aliened at all by the particular species of deed stated in the case, namely, a bargain and sale, which at \*common law could only have transferred the use); I say, notwithstanding all these anomalous circumstances, it seems to be now so far settled in Courts of law that these customary tenant-right estates are not freehold, but that they, in effect, fall within the same consideration as copyholds. that the quality of their tenure, in this respect, cannot properly any longer be drawn into question." That case was sufficient to show that the lands in question must be considered in the nature of copyhold, and being so, were within the meaning of this Act of Parliament. In *Doe d. Cook v. Danvers* (1), it was held, that an estate, whether copyhold or not, to all purposes, may well pass under the description of copyhold in a will; the intention to pass it under that description being apparent. Coupling the preamble in the first section of the Act of Parliament with the provisions of sec. 53, the property in question would seem to range itself under the description of copyhold lands.

*Cur. adv. vult.*

COLERIDGE, J. :

This was a rule for a *mandamus* to the lords of this manor, to

(1) 7 East, 299.

enter on the Court rolls of the manor, a certain indenture, touching certain customary freehold hereditaments and premises within the manor, pursuant to the 3 & 4 Will. IV. c. 74, s. 53. This is the Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance, which, after providing with very great care, a new mode of assurance for barring entails in freehold lands, proceeds, at the 50th section, to the case of lands held by copy of Court rolls, and at the 53rd, to the particular case of a tenant in tail of such lands, whose estate is merely an estate in equity. The present applicant has only an equitable estate, but he is met by the difficulty which the very language of his rule suggests, that the estate is not copyhold. This is clear upon the affidavits, \*which disclose that the estates do not pass by surrender and admittance, but by deed from the tenant to the alienee, the operative words of which, are “grant, bargain, sell, alien, surrender, and convey,” the *habendum* “to the alienee, his heirs and assigns for ever, according to the custom of the manor, and under the rents, dues, duties, and services usual and accustomed.” This deed is never enrolled on any Court roll, but produced at some subsequent Court by the grantee, who thereupon receives, on plain parchment, an admittance signed by the steward, and thereupon becomes the legal tenant. It further appears, that there are no Court rolls, nothing but the verdicts of the juries on loose sheets, upon which the steward has never been in the habit of endorsing any entries, and conceives that he has no power to do so. Further, there is a customary mode for the barring of entails by the legal tenant in tail, under which the lords receive considerable fines; and in the present case, it is sworn that the tenant of the legal estate tail dissents from the present application. Under these circumstances the writ ought not to go. The section referred to, is clearly inapplicable, and I have not been able to discover that any other provision has been made by the statute for estates of this tenure. Why they were omitted, or whether the omission was unintentional, I cannot say, but it is sufficient for the present decision, that the statute does not cast upon the lords the duty of doing what they have been required to do.

REG.  
 C.  
 THE LORDS  
 OF THE  
 MANOR OF  
 INGLETON.

[ \*701 ]

*Rule refused.*

1840.

## JORDAN AND ANOTHER v. CHOWNS.

[ 709 ]

(8 Dowling, Pr. Cas. 709—716.)

On applications under 7 Geo. II. c. 20, s. 1, to stay proceedings in an action on a bond, securing the principal and interest payable on a mortgage, if the mortgagee seeks to obtain interest for the interval between granting the rule, and the actual payment of the principal into his hands, he must make his claim to it, at the time of discussing the rule, for he cannot afterwards sustain it.

[ \*710 ]

*BARSTOW* showed cause against a rule *nisi*, obtained by *White*, calling on the plaintiffs to show cause why, within ten days, they should not execute and deposit with the Master the deed of transfer of the mortgage granted by the defendant to the plaintiff, and why the plaintiff should not pay the cost of this application, the defendant's attorney undertaking to pay the costs of executing the said transfer. This was an action of debt on the bond executed by the defendant to the plaintiffs, to secure the payment of principal and interest on a mortgage on certain property granted by the defendant to the plaintiffs. After certain proceedings were had in the action, a rule was obtained by the defendant, pursuant to 7 Geo. II. c. 20, s. 1, to stay proceedings, on payment into Court of the principal moneys and interest due on the mortgage, and all costs of suit. This rule was obtained on the 31st of January, 1840. The principal money and interest, down to the date of paying in, was paid into \*Court, and an arrangement made between the parties with respect to the costs; but the plaintiff was not entitled, by that rule to take the money out of Court. Subsequently, in consequence of necessary delays on both sides, several weeks elapsed before the deed of transfer of the mortgage was ready for execution by the plaintiffs. When tendered to them, they refused to execute, unless the interest on the principal money, from the date of the paying it, down to the time of executing the deed, was paid. This, the defendant declined doing, and the present rule was accordingly obtained. *Barstow* submitted, that according either to the words or the equity of the statute, 7 Geo. II. c. 20, the plaintiffs had a right to the interest claimed. The words of section 2 of that Act were, "that where any action shall be brought on any bond for payment of the money secured by such mortgage, or performance of the covenants therein contained, or where any action of ejectment shall be brought in any of his Majesty's Courts of Record at Westminster, or in the Court of Quarter Sessions in Wales, or in any of the superior Courts in the counties palatine of

Chester, Lancaster, or Durham, by any mortgagee, or mortgagees, his, her, or their heirs, executors, administrators, or assigns, for the recovery of the possession of any mortgaged lands, tenements, or hereditaments, and no suit shall be then depending in any of his Majesty's courts of equity in that part of Great Britain called England, for or touching the foreclosing or redeeming of such mortgaged lands, tenements, or hereditaments; if the person or persons having right to redeem such mortgaged lands, tenements, or hereditaments, and who shall appear and become defendant or defendants in such action, shall, at any time pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into Court, where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit or suits at law or in equity, upon such \*mortgage (such money, for principal, interest, and costs, to be ascertained and computed by the Court, where such action is or shall be depending, or by the proper officer by such Court to be appointed for that purpose), the moneys so paid to such mortgagee or mortgagees, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant of, and from the same accordingly; and shall and may, by rule or rules of the same Court, compel such mortgagee or mortgagees, at the costs and charges of such mortgagor or mortgagors, to assign, surrender, or reconvey such mortgaged lands, tenements, and hereditaments, and such estate and interest as such mortgagee or mortgagees have or hath therein, and deliver up all deeds, evidences, and writings, in his, her, or their custody, relating to the title of such mortgaged lands, tenements, and hereditaments, unto such mortgagor or mortgagors who shall have paid or brought such moneys into the Court, his, her, or their heirs, executors or administrators, or to such other person or persons as he, she, or they shall for that purpose nominate or appoint." The words of this section might possibly in strictness only apply to interest due down to the time of obtaining the rule absolute for staying the proceedings; but it must be the clear intention of the Legislature, on the equity of the statute, that the plaintiff should be entitled to it down to the time of his receiving, or having the power to take the money; otherwise great injustice would be wrought to the mortgagee. Although the money was paid into Court, pursuant to the rule, many months might, but some little time must, where all diligence was used,

JORDAN  
v.  
CHOWNS,

[ \*711 ]

JORDAN  
v.  
CHOWNS.

[ \*712 ]

elapse, before the transaction was completed, and the mortgagee entitled actually to receive it. During all that period, the mortgagee was deprived of his interest on the principal money. If the amount was large, considerable loss would be the result. Those remarks applied to the present case. It might be \*said, on the other side, that the claim for interest, in respect of the period between making the rule absolute for staying proceedings, and the actual payment of the money into the hands of the mortgagee, ought to have been made at the time of disposing of that rule; that the rule proceeded on the statute, and, therefore, must be construed by the statute; that the statute allowed no interest beyond the time of paying the principal money into Court, and, therefore, the mortgagee was not entitled to it. Those arguments, however, could not disentitle the mortgagee to the equitable consideration of his claim. Previous to the passing of the statute, the 7 Geo. II., no such relief could be afforded by a court of law, as that which might now be obtained pursuant to the statute. Recourse was always necessarily had to a court of equity. The effect of the statute, therefore, was, in fact, to give a new and equitable power to the courts of law. Being an equitable power, it ought to be exercised in such a way as both to protect the interests of the mortgagor, and to avoid injuring the mortgagee, especially as the former rule, which had been obtained by the defendant, could not be said to have been obtained in strictness on the statute. It no where appeared, upon the affidavits, but the contrary, that any tender of the money had ever been made before that rule was obtained. The authority of the Court, under the statute, only existed upon the assumption of one of two acts, actual payment, or tender. As, therefore, the defendant had not complied with the requisites of the statute, there was the more reason for dealing with this application according to the equitable summary jurisdiction of the Court, and not in strictness according to the statute. For, if the course contended for by the other side was pursued, certainly the mortgagor would be protected, but the mortgagee would be injured. That could never have been the intention of the Legislature. The cases in equity supported this view of the course which ought to be taken with respect to the mortgagee's claim to interest. He cited \**Gyles v. Hall* (1), *Bishop v. Church* (2), *Garforth v. Bradley* (3), *Wiltshire v. Smith* (4), Coote on Mortgages,

[ \*713 ]

(1) 2 P. Wms. 377.  
(2) 2 Ves. Sen. 371.

(3) *Ibid.* 676.  
(4) 3 Atk. 89.

JORDAN  
v.  
CHOWNS.

534. At all events the plaintiffs were not obliged to accept the undertaking of the defendant's attorney to pay the costs of the transfer. They were entitled to have those costs paid before the transfer was executed.

*White*, in support of the rule, contended that the cases on the other side were distinguishable from the present, as in the two former the claim to interest depended upon the question of whether a proper tender had been made of the principal money; and in the last the decision proceeded upon the opinion of the Court, that a mortgagee was entitled to refuse to take the principal and interest though tendered, until he had an opportunity of advising with his attorney, whether he might safely execute the deed of assignment. He cited 2nd Powell on Mortgages, p. 934. With respect to the claim for interest for the period between the drawing up of the rule on the 31st of January, and the payment of the money into the hands of the plaintiff, that ought properly to have been made the subject of discussion, on showing cause against that rule. No such claim was then set up, but the rule was drawn up in the ordinary form, in accordance with the provisions of the 7 Geo. II. c. 20, s. 1. That statute only required the payment of interest down to the time of the application being made, and, therefore, no other interest could be payable. As to the objection to accept the undertaking of the defendant's attorney, that was not sustainable, because the plaintiffs would have sufficient security in the fact that the deed of transfer, after the execution, would be deposited with the Master, and would not be delivered out to the defendant until all costs were paid.

COLERIDGE, J.:

This is a rule of considerable importance. \*It calls on Messrs. Jordan and Mackey, the two plaintiffs, to show cause why, within ten days, they should not deposit with the Master the deed of transfer of the mortgage executed by the plaintiffs to the defendant, and why the plaintiffs should not pay the costs of the application, the defendant's attorney undertaking to pay the defendant's costs on the execution of the said transfer. Before I go into the general question, there is one point which I may dispose of at once. It is said, that the plaintiffs are not bound to take the undertaking of the defendant's attorney for the costs attending the execution of the transfer. If that was the only security, the objection might be

[ \*714 ]



JORDAN  
v.  
CHOWNS.

reasonable, but the rule does not require the plaintiff to execute and deliver the instrument to the defendant, but it only requires that when executed, it should be deposited with the Master of this Court. The plaintiffs are, therefore, not prejudiced, as the instrument will not be delivered out until the costs are paid. That brings me to the important question which is here to be decided. It is raised in this manner. Here is a mortgage, and an action is brought against the defendant on the collateral bond, given by him to secure payment of principal and interest. The cause goes on to trial, and an application is made under the 7 Geo. II. c. 20, s. 1, to stay proceedings, on payment of principal and interest then due, and getting free of the mortgage. A rule was then pronounced, that the defendant was, within four days, to bring in principal and interest due on the deed, he being thereupon to be discharged from the bond and all claims to moneys due thereon. That rule was pronounced on the 31st of January last. Some delays then arose on both sides, before the transfer of the mortgage required by the defendant was duly prepared for execution. The deed was at length tendered for execution. The plaintiffs then stated that they were not bound to execute, until the interest down to the execution of the deed was paid. During this interval, the money has been locked up in Court, and the question now is, which of the \*parties is to suffer the loss of it? I am of opinion, under all the circumstances of this case, without considering the general right, that the mortgagee must suffer the loss. Now the statute provides that the person against whom the action is brought, "shall at any time, pending such action, pay unto such mortgagee or mortgagees, or in case of his, her, or their refusal, shall bring into Court, where such action shall be depending, all the principal moneys and interest due on such mortgage, and also all such costs as have been expended in any suit or suits, at law or in equity, upon such mortgage, the moneys so paid to such mortgagee or mortgagees, or brought into such Court, shall be deemed and taken to be in full satisfaction and discharge of such mortgage, and the Court shall and may discharge every such mortgagor or defendant, of and from the same accordingly." In the present instance, the first case of a direct payment has not arisen; but it is said that the second case has not arisen, because no tender has been made of the money. I think that the statute clearly contemplated the cases; first, of a payment offered and accepted; second, the case of a payment offered and refused. Where the delay in executing the deed of

[ \*715 ]

transfer is in consequence of the refusal of the mortgagee, he ought to stand to the loss. But where the delay is caused by the mortgagor, and if we were now discussing the matter as *res integra*, on the rule of the 31st of January, the observations of *Mr. Barstow* would be very strong. But I find the rule already pronounced by the Court, and any objections which there were to it ought to have been taken when it was discussed, on showing cause. I have now nothing to do, therefore, but to consider the rule as it stands and carry it into effect. Before I proceed to consider the construction of the rule, I will dispose of a remark which has been made. It is said, that there would be always some interval of time between pronouncing the rule and the execution of the reconveyance, and, therefore, it is said, that the mortgagee ought to receive interest for that period at all events. But if the statute \*provides for that state of facts, this question should have been brought before the Court at the time of discussing the original rule. The blame of the delay is, probably, equally divided between both parties. What did the rule of the 31st of January require? It required the defendant to bring the principal money and interest due to that time into Court, and to pay the costs of the action. This, it is admitted, he has substantially done. But this rule was not merely a stay of proceedings in the action, but a release under the statute. The money so paid, is to be “deemed and taken to be in full satisfaction and discharge of such mortgage.” This effect was contemplated by bringing the money into Court. No provision was then made for this delay which has occurred. The defendant has done his duty in tendering a proper conveyance to the mortgagee, and he must execute it. If he has lost his interest, it is his own fault in not providing for it by the rule of January 31st. The only remaining question is that of costs. The substantial question between the parties was that of interest, which has now been discussed. It was a new one, without any authorities on it. The present rule must, therefore, be made absolute, without costs, it being understood that the Master shall not deliver over the deed of transfer until the costs of executing it are paid to the plaintiff.

JORDAN  
f.  
CHOWNS.

[ \*716 ]

*Rule absolute, accordingly.*

REG.  
v.  
THE  
JUSTICES OF  
WILTS.

COLERIDGE, J. :

The Petty Sessions might consist of two persons as well as four ; but these gentlemen did not interfere at all in the matter.

*Barstow :*

But even by the words of the appeal clause, sect. 105, if the relator considered himself aggrieved, he might have his remedy at the Quarter Sessions. By that section it was provided, “that if any person shall think himself aggrieved by any rate, made under or in pursuance of this Act, or by any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act, and for which no particular method of relief hath been already appointed, such person may appeal to the justices at the next General Quarter Sessions of the Peace, to be held for the county, division, riding, or place, wherein the cause of such complaint shall arise.” Then, supposing the *mandamus* to go, what could the magistrates do? They have dismissed the complaint, and if they call the parties before them, what course could they pursue?

COLERIDGE, J. :

The rule might be moulded when the determination of the case arrives. Although the sum of 5*l.* is mentioned in the rule, such a modification of it might be made as would prevent injustice being done. The only question is, whether the magistrates, under this Act of Parliament, were merely ministerial or judicial officers?

[ 720 ]

*W. Alexander*, in support of the rule, contended that the words of sect. 94 rendered it imperative on the magistrates to convict the surveyor in some amount, though perhaps not precisely 5*l.* The words “shall convict,” rendered the duty of the justices merely ministerial, if they found the road out of repair. According to the old mode of proceeding, this would have been a case for an indictment; but now, recourse must be had to the magistrates. There was no hardship in the case, as the penalty was to be paid out of the highway rate, according to the enactment contained in sect. 96. The words of that section were, “That no fine, issue, penalty, or forfeiture for not repairing the highway, or not appearing to any indictment for not repairing the same, shall hereafter be returned into the Court of Exchequer or other Court, but shall be levied by and paid into the hands of such person residing in or near the

a state of thorough and effectual repair, they, the said justices, at such last mentioned Special Sessions, shall convict the said surveyor, or other party liable to the repair of the said highway, in any penalty, not exceeding five pounds; and shall make an order on the said surveyor or other person or bodies politic or corporate, liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same." Accordingly, on the information being laid, the justices issued a summons, requiring the surveyor of the highways of the parish to appear before them at a Special Sessions held for the highways, and mentioned in the summons. They also appointed a viewer to examine the road, and to report accordingly, at the Special Sessions. The Special Sessions assembled, the surveyor attended, and the viewer reported that the highway in question was out of repair. The relator of the information then required the justices to convict the surveyor in a penalty of 5*l.*, which was the maximum of the fine mentioned in the statute. This, they refused to do. The object of the present rule was to compel the justices to convict the surveyor in that sum. This, it was submitted, they could not be compelled to do; although the words in the section were "shall convict," there was a clear discretion given as to the amount of the penalty. Here, however, the exact sum was fixed by the rule. It never could have been intended by the Legislature that the justices should be bound by the word "shall," and thus become the mere machines of the relator, for the purpose of convicting. They must be presumed to have a discretion even as to whether they would convict at all. The present rule was prayed against the four justices who appeared at the Petty Sessions, on the occasion of the inquiry taking place, out of which the present application had arisen. It was sworn, however, that as to two of the justices, they had taken no part whatever in the proceeding, and, therefore \*as to them, there was no pretence whatever for making the application.

REG.  
v.  
THE  
JUSTICES OF  
WILTS.

[ \*719 ]

COLERIDGE, J.:

*Mr. Alexander*, can you support the rule against these two gentlemen?

*W. Alexander*:

They were part of the Petty Sessions, and therefore, they must be considered as co-operating with the others.

REG.  
v.  
THE  
JUSTICES OF  
WILTS.

COLERIDGE, J. :

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The rule might be moulded when the determination of the case arrives. Although the sum of 5*l.* is mentioned in the rule, such a modification of it might be made as would prevent injustice being done. The only question is, whether the magistrates, under this Act of Parliament, were merely ministerial or judicial officers?

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parish where the road shall be, as the justices or Court imposing such fines, issues, penalties, or forfeitures shall order and direct, to be applied towards the repair and amendment of such highway; and the person so ordered to receive such fine, shall, and is hereby required to receive, apply, and account for the same according to the direction of such justices or Court, or in default thereof, shall forfeit double the sum received; and if any fine, issue, penalty, or forfeiture to be imposed for not repairing the highway, or not appearing as aforesaid, shall hereafter be levied on any inhabitant of such parish, township, or place, then such inhabitant shall and may make his complaint to the justices at a Special Sessions for the highways; and the said justices are hereby empowered and authorized, by warrant under their hands, to make an order on the surveyor of the parish for payment of the same, out of the money receivable by him for the highway rate, and shall within two months next after service of the said order on him, pay unto such inhabitant the money therein mentioned." If the commencement of the section, where the justices were authorized to summon the surveyor, and the part relative to the conviction \*were compared, it would be seen that the words "shall and may" were used in the former part, while the word "shall" was used in the latter. It would seem, therefore, as if a discretion was to be given to the justices, with respect to commencing the inquiry; but when it was ascertained that the highway was out of repair, then their discretion was at an end, and they were bound to convict the surveyor. In a case at the last Hereford Assizes, tried before Mr. Justice Williams, his Lordship took the distinction between the words "shall and may" in this section, and the word "shall" in section 95, where the mode of proceeding to be adopted in case the liability to repair is denied, is pointed out. It was said on the other side, that the construction contended for in support of the rule, merely rendered the magistrates machines. That was no objection, as such a course was provided by the Legislature in many instances, as in the case of granting costs, when orders of affiliation were dismissed by the Quarter Sessions. In the case of *Rex v. Broderip* (1), where it appeared doubtful whether a conviction of a waterman for carrying in his boat, upon the river Thames, more persons than are allowed by law, must be founded upon testimony given upon oath, the Court refused a *mandamus* to compel a magistrate to enforce the conviction. The reasons given by the Court in

REG.  
5.  
THE  
JUSTICES OF  
WILTS.

[ \*721 ]

REG.  
v.  
THE  
JUSTICES OF  
WILTS.

[ \*722 ]

that case were an authority on the present. The Court there said, "It is not clear that it was the duty of the justice to issue his warrant in this case. The words of section 9, are 'that it shall be lawful for the mayor or justices to issue the warrant:' not that they are required so to do. Besides, it is at least doubtful, whether the conviction not having taken place upon examination on oath was legal, and this Court will not compel a magistrate to do that which may subject him to an action of trespass." That was an authority to show that in that case, if the Act of Parliament had "required" a magistrate to enforce a conviction, the *mandamus* would have been directed to issue: *Regina v. \*Codd* (1). With respect to the appeal clause, that could not afford an answer to the application. That was a clause introduced with quite a different object, namely, to give relief where parties were aggrieved by acts "done," and did not apply to cases where magistrates had omitted to do some act. That section gave no power to the Quarter Sessions to convict, and, therefore, it would be to no purpose that an application should be made to that tribunal. Under these circumstances, the present rule ought to be made absolute, either in its present or in a modified form.

COLERIDGE, J. :

This is an application for a *mandamus*, to be directed to four justices of the county of Wilts, commanding them to convict the surveyor of the highways of the parish of Hannington, in a penalty of 5*l.*, and to make an order upon the said surveyor to repair a certain road in the parish within a limited time. As to two of these magistrates, there is no foundation for the application, because it appears that they took no part in the proceedings. As to them, therefore, the rule cannot be made absolute. In my opinion, it is not quite clear whether the applicant knew that these magistrates took no part in the decision; but certain I am that he knew enough to lead him to make some inquiry as to them. With regard to them, therefore, the present rule must be dismissed, and with costs. But I go further. Even if he did not know that they did not take part in this matter, and he was not misled, the rule ought to follow the same course which is adopted in such cases where unsuccessful applications are made against magistrates. Now, as to the application itself. It depends on the Act of Parliament. It seems to me certainly a most extraordinary application

(1) 1 P. & D. 456.

to require magistrates to convict in a certain penalty. (Here his Lordship read sec. 94.) It is said that the only material circumstance for the justices to consider is the actual state of the road. But the application to \*the justices under the section is two-fold. It is not only to order repairs to be made, but it is to convict the surveyor in a penalty for non-repair. The statute, therefore, must be understood to apply to cases where the road is not only in a state of non-repair, but where there has been a neglect in causing the non-repair. The section then proceeds, "And if to the justices at such Special Sessions, on the day and at the place so fixed, as aforesaid, it shall appear, either on the report of the said persons so appointed by them to view, or on the view of such justices, that the said highway is not in a state of thorough and effectual repair, they, the said justices at such last mentioned Special Sessions, shall convict the said surveyor or other party liable to the repair of the said highway, in any penalty not exceeding five pounds, and shall make an order on the said surveyor or other person, or bodies politic or corporate, liable to repair such highway, by which order they shall limit and appoint a time for the repairing of the same." It is said that these words "shall convict," are imperative on the justices, and turn them into mere ministerial officers, except as to the amount of the penalty. If that had been intended to be so, the words would have been, "that if the report stated that the road was out of repair, that then they should convict the surveyor." But the words here are, "if it shall appear either on the report of the said person so appointed by them to view, or on the view of such justices," that then the conviction shall be made. What took place here? It appears, from the affidavits, that the first report was incorrect. Then the party was asked to amend his report, which he did accordingly as to the non-repair. It is contended, that the authority of the magistrates was completely delegated to the viewer, and that the magistrates, therefore, had no power to proceed further than the inquiry as to what the report was with respect to the non-repair. But I do not agree that that was the reason that these provisions were introduced into the Act. I think, therefore, that they were entitled to inquire into the whole of the case before them, and if they \*were of opinion that the road was not out of repair, they were at liberty to abstain from convicting. Suppose, after the viewer had reported that the road was out of repair, they did not think, on their own view, that the road was out of repair, would they not have a right to exercise their discretion in deciding

REG.  
C.  
THE  
JUSTICES OF  
WILTS.  
[ \*723 ]

[ \*724 ]



**COMPROMISE.** *See* Family Arrangement.

**CONFLICT OF LAWS**—1. Difference between law of England of foreign State—Burden of proof—Evidence. *Smith v. Gould*

— 2. Jurisdiction—Foreign infant—Guardianship. *See* Infant

**CONTRACT**—1. Specific performance—Court will not compel specific performance unless it can execute whole contract in the terms agreed upon in favour of defendant. *Gervais v. Edwards*

— 2. Lunatic—Necessaries. *See* Lunacy, 1.

— 3. Unstamped agreement—Agreement signed by one party only. *See* Stamp Duty.

**CONVERSION**—1. Direction to invest personalty in freehold and leaseholds—Exhaustion of trusts—Claim by heir-at-law and residuary legatee. *Hereford v. Ravenhill*

— 2. Direction to sell—Mortgage by tenant for life and remainderman—Coparceners—Mistake as to interest of remainderman—Right one-fifth as personalty instead of moiety as real estate—Mortgage affecting interest of tenant for life as to one-fifth only. *Grierson v. Kirsopp*

**COPYHOLD**—1. Manor—Surrender—General surrender—Steward bound to accept without description of tenements surrendered—Custom of steward to prepare surrenders for reasonable fee. *R. v. Lord of Manor of Bishop's Stoke*

— 2. — Mandamus. *See* Mandamus, 4.

— 3. — Steward's fee. *See* Solicitor, 4.

**COSTS.** *See* Practice, 1—3; Solicitor, 1—9; Charity and Charitable Trust, 2; Discovery, 2; Mortgage, 5—7.

**CRIMINAL LAW**—Criminal responsibility—Murder—Intent—Insane delusion—Evidence of insanity. *Daniel M'Naghten's Case*

**CROWN**—Prerogative—Colony—Legislative Assembly. *See* Colony

**DEBT**—Discharge of debt—Delivery of promissory note for amount of debt—Acceptance by creditor. *Sayer v. Wagstaff*

**DEED** — 1. Construction — "Or" construed as "and." *White v. Supple*

— 2. Covenant—Title deed—Covenant for production—Trustees—Solicitors—Costs. *Hotham v. Somerville*

— 3. Rectification—Mistake—Parol evidence—Principles on which Courts of equity proceed in reforming deeds. *Mortimer v. Shortall*

— 4. Title deeds—Right to estate confers right to possession of title deeds. *Smith v. Chichester*

**DEFAMATION**—Slander—Action on the case—Words spoken of plaintiff in her vocation—Evidence to show that words innocently true. *Rumsey v. Webb*

**DISCOVERY**—1. Inspection and production of documents—Partnership—Entries concerning business of firm in partner's private diaries. *Carew v. White*

— 2. — Defendant's affidavit showing inconvenience of leaving documents in office—Ground for indulgence not stated in answer—Costs. *Gardner v. Dangerfield*

**DISCOVERY**—3. Inspection and production of documents—Defendant resisting discovery of facts likely to incriminate himself—Indictment of defendant pending proceedings in cause—Extension of time for answering until after trial of indictment. *Lee v. Read* . . . 526

**ECCLESIASTICAL LAW**—1. Baptism—Child baptised by layman in name of the Trinity—"Unbaptised" person within meaning of Prayer Book—Burial—Refusal to perform office on person so baptised. *Escott v. Mastin* . . . 351

— 2. Canon law—Marriage—Marriage between member of Church of Ireland and Presbyterian—Ceremony performed in private house by Presbyterian minister. *R. v. Millis* . . . 134

— 3. Clergyman—Suspension—Refusal to perform burial service—Person baptised by layman—"Unbaptised" person. *Escott v. Mastin* . . . 351

**ESTATE**—1. Estate for life—Life annuities and policies—Sale not ordered by Court—Direction to keep up policies. *Glengull v. Barnard* . . . 493

— 2. Vested interest—Marriage settlement—Settlement to issue of marriage in equal shares in default of appointment—Immediate vested interests liable to be divested on exercise of power. *Heron v. Stokes* . . . 652

And see Settlement (Marriage), 6.

**ESTATE PUR AUTER VIE**—Learning as to the nature and quality of—Quasi entail in. *Allen v. Allen* . . . 696

**ESTOPPEL**—1. By record—Decree—Bar to right of revivor—Delay in proceedings—Discretion of Court. *Higgins v. Shaw* . . . 726

— 2. Probate—Proceedings in Privy Council—Petition—Irregular proceedings. *Henfrey v. Henfrey* . . . 331

**EVIDENCE**—1. Hearsay—Infancy, plea of—Declarations by defendant's father (since deceased) as to son's age. *Figg v. Wedderburne* . . . 816

— 2. Insanity—Insane delusion—Medical evidence—Capacity to distinguish between right and wrong. *Daniel M'Naghten's Case* . . . 85

— 3. Parol evidence—Rectification of deeds—Supplemental evidence in writing. *Mortimer v. Shortall* . . . 730

— 4. Peerage—Barony in abeyance—Former claim, minutes of proceedings on—Proof of first creation. *Fitzwalter Peerage* . . . 316

— 5. — Pedigree—Old Prayer Book—Manuscript entries—Age of handwriting—Expert evidence. *Tracy Peerage* . . . 59

— 6. — Expert evidence—Professional witness—Claimant's solicitor. *Fitzwalter Peerage* . . . 80

— 7. — Tombstone, inscription on—Non-production of tombstone—Evidence of witnesses who had seen inscription. *Tracy Peerage* . . . 59

— 8. — Copy of will produced from Prerogative Office—Proof of unsuccessful search for original. *Fitzwalter Peerage* . . . 316

— 9. — Fallibility of traditional evidence—Evidence of ignorant and illiterate persons—Observations on value of testimony given by affidavit. *Johnston v. Todd* . . . 573

— 10. Secondary evidence—Abstract of deed not admitted as. *Lewis v. Leatham* . . . 613

**EVIDENCE**—11. Witness—Illiteracy—Attestation of will—Alterations and erasures—Presumption. *Cooper v. Bockett* . . . . . 5

— 12. Affidavit—Misconduct of jurymen. *See Jury*.

*And see Defamation.*

**EXECUTION**—Fi. fa.—Irregularity—Writ sued out after defendant's death. *Chick v. Smith* . . . . . 8

**EXECUTOR AND ADMINISTRATOR**—1. Administration—Administration suit—Bill filed by party entitled to contingent reversionary interest—Decree for account—Failure of plaintiff's interest before report—Costs. *Hay v. Bowen* . . . . . 3

— 2. — Assets—Debts—Real estate—Liability to debts when not charged—3 & 4 Will. IV. c. 104. *Evans v. Brown* . . . . . 42

— 3. — Practice—Proof of bond debt—Affidavit—Statement of consideration—Proof of consideration—Discretion of Master. *Rundell v. Lord Rivers* . . . . . 38

— 4. — Administration by Court—Provision for all known claim—Further claim after devisee let into possession—Right of trustees to re-enter to provide for claim—Protection of trustees where assets administered by Court. *Underwood v. Hatton* . . . . . 40

— 5. Assent to legacy—Trust to A. for life—Remainder to pay legacies and residue to such of three persons as should be living at A's death—A. allowed to retain possession of leaseholds during his life—Deed by residuary legatees agreeing to take as tenants in common—Executor joining in deed as husband of one legatee. *Att.-Gen. v. Pitt* . . . . . 44

— 6. Semble that an executor may prove will of his testator and renounce probate of will of which his testator had been sole executor. *Barker v. Railton* . . . . . 10

— 7. Suit to establish will—One witness abroad—Practice. *Hare v. Hare* . . . . . 38

— 8. Legacy to executor—Executor physically incapable of proving will. *See Will*, 24.

**FAMILY ARRANGEMENT**—1. Compromise—Interest in estate—Agreement not to impeach marriage with deceased wife's sister—Public policy. *Westby v. Westby* . . . . . 72

— 2. Principles upon which a Court of equity acts in dealing between father and son. *Wallace v. Wallace* . . . . . 76

**FRAUD AND MISREPRESENTATION**—Concealment—Non-disclosure of material circumstance—Principal and surety—Concealment need not be wilful. *Railton v. Mathews* . . . . . 30

**HIGHWAY**—Repair—Information—Justices—Report of viewer—Conviction of surveyor—Discretion of justices—5 & 6 Will. IV. c. 60. s. 94. *R. v. Justices of Wilts* . . . . . 88

**HOUSE OF COMMONS**—Power to commit for contempt—Ancient usage. *Kielley v. Carson* . . . . . 36

**HOUSE OF LORDS**—Practice of. *See Practice*, 7, 8.

**INFANT**—1. Deed taking effect on delivery, voidable only, not void—Act showing intention to avoid deed—Onus on claimants in opposition to deed. *Allen v. Allen* . . . . . 68

— 2. Guardian—Foreign infant—Residence in England—Jurisdiction of Court—Appointment of guardian. *Johnstone v. Beattie* . . . . . 20

**INFANT**—3. Guardianship—Revocation. *See Will*, 17.

—— 4. Estate—Receiver. *See Limitations (Statute of)*, 3.

—— 5. Marriage settlement. *See Settlement (Marriage)*, 4.

—— 6. Infancy, plea of—Evidence—Hearsay. *See Evidence*, 1.

**INJUNCTION.** *See Acquiescence; Landlord and Tenant*, 1.

**INSURANCE (LIFE)**—1. Policy—Engagement “to pay out of funds” —Funds consisting partly of real estate—Gift of policy to charity—*Fortmain. March v. Att.-Gen.* . . . . . 550

—— 2. — Assignment—Notice—Policy effected by agent on his own life—Notice of assignment sent to agent himself as local representative of Company. *In re Hennessy* . . . . . 811

**JUDGMENT DEBT**—Interest on. *See Limitations (Statute of)*, 2.

**JURY**—Misconduct of jurymen—Drawing lots—Evidence—Affidavits of persons swearing to fact of their own knowledge. *Harvey v. Hewitt.* . . . . 838

**JUSTICES**—Mandamus—Special Sessions—Attendance of justices making no part in decision—Liability to be brought before K. B. on application for mandamus. *R. v. Justices of Wilts* . . . . . 858  
*And see Mandamus*, 3.

**LANDLORD AND TENANT**—1. Covenant—Ancient meadow—Covenant not to burn any part of demised premises—Penalty—Payment of penalty does not authorise act covenanted against—Injunction. *French v. Macale* . . . . . 675

—— 2. Lease—Mistake—Excess in quantity of land demised—Rectification. *Mortimer v. Shortall* . . . . . 730

—— 3. Tenant in possession under subsisting tenancy—Parol contract for lease—Specific performance—Part performance—Statute of Frauds. *Brennan v. Bolton* . . . . . 721

**LEGACY DUTY**—Will—Power of sale—Direction to sell—Conversion. *Williamson v. Advocate-General of Scotland* . . . . . 1

**LIMITATIONS (STATUTE OF)** — 1. Arrears of interest—Money charged on land—Real Property Limitation Act. *Henry v. Smith* . . . . . 738

—— 2. — Interest on judgment debt—Real Property Limitation Act—Effect of 3 & 4 Vict. c. 105, s. 26. *Henry v. Smith* . . . . . 738

—— 3. Infant—Infant's estate—Incumbrance—Proceedings in Chancery—Master's report in favour of incumbrance—Receiver, appointment of does not prevent operation of statute. *Harrison v. Duignan* . . . . . 689

*And see Charity and Charitable Trust*, 1.

**LUNACY** — 1. Lunatic—Necessaries—Implied contract—Money expended for protection of lunatic's person and estates—Cost of proceedings—Real estate of lunatic. *Williams v. Wentworth* . . . . . 515

—— 2. Settlement—Acquiescence. *See Will*, 19.

**MALICIOUS PROSECUTION** — Trespass—Breach of the peace—Arrest—Justification. *Price v. Seeley* . . . . . 13

**MANDAMUS**—1. Canal Company—Injury to adjoining property—Compensation—Necessity of showing clear refusal. *R. v. Widdall Canal Co.* . . . . .

— 2. Joint application by two for mandamus to enforce claims *ex parte*. *Scott v. Morgan* . . . . .

— 3. Justices—Warrant to levy expenses of cutting—Necessity of showing demand of expenses from person sought charged and that justices had notice of that demand. *Ex parte Marsh* . . . . .

— 4. Manor—Refusal of mandamus to lord to enter on Copyhold indenture concerning customary freeholds—Custom—Application of Fines and Recoveries Act (3 & 4 Will. IV. c. 74), s. 58. *R. v. Manor of Ingleton* . . . . .

**MANOR.** See Copyhold.

**MARRIAGE.** See Ecclesiastical Law, 2.

**MISTAKE**—Rectification of deeds—Principles on which Court of equity proceed in reforming deeds and written instruments. *M. v. Shortall* . . . . .

**MORTGAGE**—1. Collateral security—Stay of proceedings—Immediate interest between grant of rule and actual payment of principal—Time for claim. *Jordan v. Chowns* . . . . .

— 2. Equity of redemption, settlement of—Laches of mortgagee—Neglect to demand interest from tenant for life—Whether prejudice to claim against those in remainder. *Wrixon v. Vize* . . . . .

— 3. Foreclosure—Account—Receipt of rents after Master's appointment and before day appointed for payment—Further reference. *Allen v. Foster* . . . . .

— 4. — Parties—Suit by second mortgagee against mortgagee and subsequent mortgagees—First mortgagee not party to suit. *Richards v. Cooper* . . . . .

— 5. — Sub-mortgage—Sub-mortgagees made defendants—Right of sub-mortgagees to costs as against mortgagee. *Smith v. Chichester* . . . . .

— 6. — Costs of suit—Executor of insolvent mortgagor. *Allen v. Lord Mountmorris* . . . . .

— 7. — Death of mortgagor—Bill by mortgagee on behalf of himself and other creditors—Priority of mortgage money to cost of suit. *Aldridge v. Westbrook* . . . . .

— 8. — Welsh mortgage—Covenant for repayment "when required"—Presumption that instrument is an ordinary mortgage. *Bulfe v. Lord* . . . . .

— 9. Mortgagee in possession—Receiver—Constructive possession. *Horlock v. Smith* . . . . .

— 10. Mortgage by tenant for life and remainderman—Direction of sale—Conversion—Interest of mortgagees. *Grievson v. Kiropp* . . . . .

— 11. Title deeds, mortgagee's right to possession of—Deposit of deeds by mortgagor with his solicitor—Lien. *Smith v. Chichester* . . . . .

**NOTICE**—1. Assignment of lease by agent—Fraud—Notice assignor's character as agent. *Molony v. Kernan* . . . . .

— 2. Purchasers *pendente lite*—Real estate—Marriage settlement—Purchasers under settlement made subsequently to decree for account of estate devised by settlor's father—Estate comprised in subsequent settlement. *Higgins v. Shaw* . . . . .

**PARTNERSHIP**—1. Account—Re-opening defective accounts—  
 lapse of time—Acquiescence. *Scott v. Milne* . . . . . 478

— 2. Entries by partner in private diaries. See *Discovery*, 1.

**PEERAGE**—1. Ancient barony—Abeyance—Former claim—Minutes  
 proceedings—Evidence—Proof of first creation. *Fitzwalter Peerage* . 316

— 2. Pedigree—Evidence. See *Evidence*, 5—8.

**POOR LAW**—Parish property—Churchwardens and overseers—Title  
 / prescription—Union and Parish Property Act, 1835. *Worge v. Relf*  
 824

**POWER**—1. Execution—Power to appoint among children—Gift  
 children equally in default of appointment—Appointment equally by  
 will not executed with formalities required by power—Supply of  
 formalities by Court. *Lucena v. Lucena* . . . . . 494

— 2. — Power to appoint by will—Form of attestation. *Burdett*  
*Spilsbury* . . . . . 105

— 3. — Appointment of part of fund to B. and of part to others  
 1 death of B.—Intermediate interest—Gift by implication. *Henderson*  
*Constable* . . . . . 505

— 4. — Devise to B. in tail—Power in default of issue to give by  
 will, “confiding” in her not to alienate from testator’s “nearest family”  
 -Appointment to husband—“Nearest family” construed “heir.”  
*Riffiths v. Evan* . . . . . 491

— 5. — General power—Power to appoint residuary estate of  
 husband—Will reciting power and giving all the rest “of her personal  
 estate.” *Davies v. Fisher* . . . . . 468

**POWER OF LEASING**—Execution—Power to lease for 21 years at  
 best improved yearly rent and without fine—Lease for 21 years—Last  
 half year’s rent payable before end of term. *Rutland v. Wythe* . 116

**PRACTICE**—1. Costs—Second trial—Costs of rehearing—“Costs of  
 suit as between solicitor and client”—Costs of rehearing not specially  
 mentioned. *Agabeg v. Hartwell* . . . . . 495

— 2. — Will—Plaintiff having no interest—Payment of costs out  
 of fund. *Thomason v. Moses* . . . . . 421

— 3. — Security for costs—Foreigner domiciled abroad with  
 house in London—Payment into Court of part of sum claimed—Order to  
 retain part as security for costs of action. *Le Normand v. Prince of Capua*  
 818

— 4. Decree in absence of material party. *Willats v. Busby* . 466

— 5. Fund in Court—Judgment staying delivery of cheques.  
*Robinson v. Wood* . . . . . 530

— 6. — Stop order—Proof of assignor’s right to fund in Court—  
 Affidavit. *Quarman v. Williams* . . . . . 435

— 7. House of Lords—Standing order—Appeal—Signature by  
 counsel. *Price v. Seeley* . . . . . 13

— 8. — Rule to hear only two counsel for each party. *R. v. Millis*  
 134

— 9. Privy Council—Irregular procedure—Appeal—Estoppel—  
 Reply—Reply not allowed by practice of Court below. *Henfrey v. Henfrey*  
 331

**PRACTICE**—10. Notice of motion embracing two subjects—Failure principal subjects—Costs of motion. *Sturch v. Young* . . . 5

— 11. Parties to action—Will—Numerous class of beneficiaries *Harvey v. Harvey* . . . 4

— 12. — Breach of trust—Suit against one trustee in absence of others. *Perry v. Knott* . . . 34

— 13. — Separate purchasers of leaseholds held under same lease. See *Specific Performance*, 1.

— 14. Pleading—Objection by prior mortgagee that plaintiff, puisne mortgagee, had not offered to redeem—Objection taken first time at hearing. *Bulfe v. Lord* . . . 74

— 15. Stay of proceedings—Abatement of suit—Death of plaintiff after answer and after liberty to amend refused—Original bill filed by executors—Costs in first suit unpaid. *Altree v. Hordern* . . . 54

— 16. — Mortgage—Bond—Intermediate interest—7 Geo. II c. 20, s. 1. *Jordan v. Chowns* . . . 83

— 17. — Sole plaintiff—Failure of interest pending reference to take accounts—Costs. *Hay v. Bowen* . . . 57

— 18. Witness—Suit to establish will—One witness abroad. *Harvey v. Hare* . . . 54

**PRINCIPAL AND AGENT.** See *Account*.

**PRINCIPAL AND SURETY**—Guaranty—Misrepresentation—Concealment—Non-disclosure of material circumstances affecting agent's credit. *Railton v. Mathews* . . . 30

**PRIVY COUNCIL**—Practice of. See *Practice*, 9.

**PUBLIC POLICY.** See *Family Arrangement*, 1.

**RECTIFICATION**—Of deeds. See *Mistake*.

**SETTLEMENT (MARRIAGE)**—1. Covenant—Intention of settlor—"Or" construed to mean "and." *White v. Supple* . . . 74

— 2. — Covenant to settle—Death of covenantor—Remedy in equity of covenantees as against general creditors of deceased. *Aldridge v. Westbrook* . . . 463

— 3. Estate of husband—Breach of covenant. *Wallace v. Waller* . . . 76

— 4. Infant—Settlement by Court on first marriage of infant—Whether good as against second and third husbands—Notice of settlement—Arrears of income due at time of third marriage—Separate use. *Ashton v. M'Dougall* . . . 414

— 5. Next of kin—Ultimate limitation to next of kin of wife—Death of wife leaving parents and child. *Withy v. Mangles* . . . 9

— 6. Post-nuptial articles—Covenant to settle as counsel should direct—Settlement in tail male—Estate for life—"Heirs of the body." *Rochfort v. Fitzmaurice* . . . 617

— 7. Vested interests—Power of appointment. See *Estate*, 2.

— 8. Breach of trust—Consent of wife—Impounding wife's interest in fund. See *Trust*, 2.

**SETTLEMENT (VOLUNTARY).** *See Settlement (Marriage), 6.*

**SHIP AND SHIPPING**—1. Bottomry bond—Bond given partly for money advanced to obtain master's discharge from arrest and partly for necessary disbursements and port dues—Bond held good in part and void for residue. *Smith v. Gould* . . . . . 326

— 2. Mortgage — Whaler — Bill of sale — Equitable mortgage — Grant of ship "with all masts, sails . . . and appurtenances"—Whether passing cargo. *Langton v. Horton* . . . . . 397

**SOLICITOR**—1. Costs—Lien—Priority—Deposit of new lease by mortgagor. *Smith v. Chichester* . . . . . 746

— 2. — — General consideration of the nature and extent of a solicitor's lien on the papers of his client. *Blunden v. Desart* . . . . . 753

— 3. — — Priority—Judgment obtained against client subsequently to deposit of deeds—Costs due both before and after entry of judgment. *Blunden v. Desart* . . . . . 753

— 4. — — Taxation of costs—Fees of steward of manor—Solicitor acting as steward only. *Allen v. Aldridge* . . . . . 533

— 5. — — Non-contentious business — Business connected with profession of solicitor—6 & 7 Vict. c. 73. *Allen v. Aldridge* . . . . . 533

— 6. — — Order for taxation after payment of bill—Time within which order may be obtained as of course—Volunteer has no right to taxation. *In re Becke and Flower* . . . . . 537

— 7. — — Time within which order may be obtained—Application considered as made at time of answering petition—6 & 7 Vict. c. 73. *Sayer v. Wagstaff* . . . . . 540

— 8. — — Application by cestui que trust for taxation—Costs paid by trustees more than twelve months before application—6 & 7 Vict. c. 73, s. 41—"Any such bill." *In re Downes* . . . . . 545

— 9. — — Taxation after payment — Bill containing items not sufficiently explained—Client not in independent position at time of settlement. *Nokes v. Warton* . . . . . 554

— 10. Payment out of Court—Obtaining payment with knowledge that money belongs to another—Personal liability. *Ezart v. Lister*. 570

**SPECIFIC PERFORMANCE**—1. Two houses held under same lease—Sale in separate lots—Condition that purchasers should be parties to each other's assignment—Whether purchaser of one lot necessary party to specific performance against purchaser of other lot. *Paterson v. Long* . . . . . 461

— 2. Principles on which Court compels specific performance of contract. *See Contract, 1.*

*And see Landlord and Tenant, 3; Vendor and Purchaser.*

**STAMP DUTY**—Contract—Work and labour—Unstamped agreement—Evidence—Right to recover on quantum meruit—Agreement signed by plaintiff only. *Hughes v. Budd* . . . . . 835

**TENDER**—Cheque enclosed in letter—Receipt requested by return—Condition—Return of cheque and demand of larger sum—Waiver of objection to nature of tender. *Jones v. Arthur* . . . . . 833



**TRUST**—1. Breach of trust—Parties to suit—Suit against one trustee in absence of other—Suit by party entitled to one moiety of ascertained fund. *Perry v. Knott* . . . . . 362

— 2. — Settlement—Power to wife to appoint by will—Investment in leaseholds—Consent of wife—Liability of husband and trustees—Application by appointees under wife's will to impound her interest in fund—Parties to suit. *Kellaway v. Johnson* . . . . . 511

— 3. Declaration of trust—Gift to B. for benefit of B.'s daughters—Investment by B. in his own name together with monies of his own—Admission of trust of aggregate fund. *Thorpe v. Owen* . . . . . 494

— 4. Executory trusts, no difference between those created by post-nuptial and voluntary settlements or by will. *Rochfort v. Fitzmaurice* . . . . . 617

— 5. New trustee, appointment of by Court—Stock standing in sole name of surviving trustee. *Finlay v. Howard* . . . . . 793

— 6. — Settlement—Power to appoint new trustee if any "should become incapable or unfit to act"—Bankruptcy of trustee—Transfer of trust estate to new trustees—Reference to Master on appointment by Court. *In re Roche* . . . . . 686

— 7. Costs—Taxation of bill paid by trustees—Application by cestui que trust. See Solicitor, 8.

**VENDOR AND PURCHASER**—1. Specific performance—Interest on purchase money—Reversion expectant on lease for lives. *Enraght v. Fitzgerald* . . . . . 637

— 2. — Title—Special directions as to time on reference to Master. *Enraght v. Fitzgerald* . . . . . 637

— 3. — Misedescription—Sale by auction—Water rights from adjoining lots shown on sale plan—Other lots sold without reservation of rights to plaintiff's lot—Compensation—Costs. *Fewster v. Turner* 607

— 4. — Sale of real estate after execution of voluntary settlement by vendor—One beneficiary under settlement out of jurisdiction—Decree saving rights of absent party. *Willats v. Busby* . . . . . 466

And see Specific Performance.

**WILL**—1. Accumulation—Direction to invest residuary personal estate in land and to accumulate income—Tenant for life of land, right to interest of uninvested personalty. *Tucker v. Boswell* . . . . . 575

— 2. Annuity—Annuities held successive and not cumulative. *Baylee v. Quin* . . . . . 671

— 3. — Annuity—Duration of annuities—Perpetual annuities or annuities for life—Rule in *Wild's* case. *Heron v. Stokes* . . . . . 652

— 4. — Gift to A. and B. "to be equally divided during their lives"—Gift over to C.—Death of one annuitant—Survivorship. *M'Dermott v. Wallace*. . . . . 441

— 5. — Gift of annuity to "such of my relations as my widow shall deem . . . meriting relief"—Widow of testator's brother—Right of relative to question appropriation. *Harvey v. Harvey* . . . . . 435

— 6. Charge of legacies—General direction that legacies should be paid by residuary legatee—Charge of two legacies on timber specifically bequeathed—Exoneration of general personal estate. *Lamphier v. Despard* . . . . . 641

— 7. Condition—Condition intended inconsistent with and repugnant itself—Condition held void. *Byng v. Lord Strafford* . . . . . 568

**WILL**—8. Condition—Penalty—Gift over—"Personal and landed estates"—"Then" and "afterwards"—Eldest son. *Hoare v. Byng* 122

— 9. Conversion—Direction to invest personalty on freeholds or leaseholds and to settle them on trusts applicable to realty—Exhaustion of trusts—Claim by heir-at-law and residuary legatee. *Hereford v. Ravenhill* . . . . . 411

— 10. Direction to divide property between sister and her daughters—Distribution per capita. *Heron v. Stokes* . . . . . 652

— 11. Estate tail—Devise to B. for life of herself and husband—Remainder to lawful issue of B.'s body for ever. *Griffiths v. Evan* . 491

— 12. — First legatee of quasi estate tail in personalty—Absolute interest, notwithstanding manifest intention to give succession of limited interests. *Byng v. Lord Strafford* . . . . . 568

— 13. Execution—Acknowledgment—Witness called in "to sign a paper"—Nature of document not explained—Signature of testator not seen—Wills Act, 1837, s. 9. *Hlott v. Genge* . . . . . 366

— 14. — Evidence of attesting witness—Signature of testator not seen—Alterations and erasures—Presumption—Evidence of illiterate witnesses. *Cooper v. Bockett* . . . . . 371

— 15. Gift to insane wife, to be increased in event of recovering sanity—Destination of extra sum. *Tucker v. Boswell* . . . . . 575

— 16. Gift to widow of full and entire enjoyment of real and personal estates for life—Power to retain sum to renew leaseholds—Right to enjoy leaseholds in specie—Surrender of lease—Option to renew. *Harvey v. Harvey* . . . . . 435

— 17. Infant—Guardianship—Revocation—Appointment of widow and two others by will—Codicil leaving "care, charge and education" to widow. *Hare v. Hare* . . . . . 584

— 18. Legacy—Ademption—Sale of property previously bequeathed—Lien for unpaid purchase money, whether passing to devisee—1 Vict. c. 26, s. 23. *Farrar v. Earl of Winterton* . . . . . 392

And see *Curre v. Bowyer* . . . . . 395, n.

— 19. — Lunatic father—Settlement of similar amount on son on marriage—Settlement proposed and acquiesced in in lucid intervals. *Browne v. Browne* . . . . . 601

— 20. — "Household furniture, plate, house linen and all other chattel property"—Whether passing entire personal estate. *Lamphier v. Despard* . . . . . 641

— 21. — Joint tenancy—Gift to daughter and her younger children—Absolute interests as joint tenants. *Sutton v. Torre* . 614

— 22. — Priority—Legacy to widow in lieu of dower. *Acey v. Simpson* . . . . . 404

— 23. — Substitution—Gift out of particular fund—Revocation by codicil and gift of half amount only—No reference to particular fund—Failure of fund—No right to payment out of general assets. *Bristow v. Bristow* . . . . . 501

— 24. — Legacy to executor—Aged executor incapacitated by bodily and mental infirmity from proving will. *Hanbury v. Spooner* 585

— 25. Limited fund—Directions to pay sum to each child of nephew on attaining 21—Deficiency in fund—Right of children first attaining 21 to full sum notwithstanding deficiency—After-born children, right of to participate. *Evans v. Harris* . . . . . 409

**WILL**—26. Power of sale—Direction to sell—Legacy duty. *Williams v. Advocate-General of Scotland* . . . . .

— 27. Remoteness—Accumulation—Vesting—Gift of residue to A. for life—Specific sum in remainder to A.'s eldest son at 30—Rest between A.'s children at 24. *Greet v. Greet* . . . . . 431

— 28. — Perpetuity—Vesting of gift within time limited by rule—Leaseholds—Accumulation of rents for renewal of other leaseholds. *Curtis v. Lukin* . . . . . 442

— 29. Residue—Gift of residue subject to contingency—Revocation and gift of legacy by codicil—Substitutional gift—Whether substituted legacy subject to limitations as original gift. *Alexander v. Alexander* . . . . . 568

— 30. Revocation—Two wills disposing of entire property—No revocation in second will. *Henfrey v. Henfrey* . . . . . 331

— 31. Specific bequest of stock—Dividends accruing before stock becomes transferable—Whether passing with stock. *Bristow v. Bristow* . . . . . 501

— 32. Trust—Trust for animal—Bequest to executor for keep of horse—Executor's right to surplus. *Pettingall v. Pettingall* . . . . . 613

— 33. — Precatory trust—Illegitimate child left under protection of wife "to be by her apprenticed and taken care of and to be by her provided for"—Right to maintenance out of testator's estate. *Butt v. Anns* . . . . . 640

— 34. Ultimate limitation to "next nearest heir and so on"—Restriction on disposition—Limitation void for uncertainty—Costs where plaintiff has no interest—Payment out of fund. *Thomason v. Moss* . . . . . 421

— 35. Vested interest—Residue to widow for maintenance of children—Gift over to children equally at 21 on death of widow—Child dying under 21 in widow's lifetime. *Butcher v. Leach* . . . . . 532

— 36. Vesting—Remoteness—Gift of personalty to A. for life and after his death for his children on attaining 25—Gift over in case no child should attain 25. *Davies v. Fisher* . . . . . 468

**WORDS**—Residue—"Remaining property." *Heron v. Stokes* . . . . . 652.  
666—670

— "Afterwards." See Will, 8.

— "All other chattel property." See Will, 20.

— "Nearest family." See Power, 4.

— "Or." See Settlement (Marriage), 1.

— "Then." See Will, 8.

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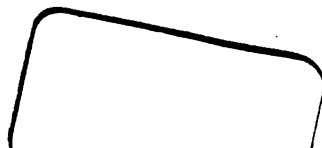
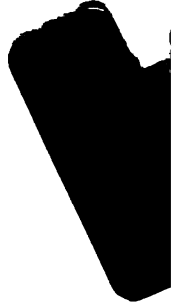




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